Case Comment

Allegations of Criminal Conduct: Application of the Fact-Opinion Dichotomy in Defamation Actions

I. INTRODUCTION

The freedoms of speech and press are two fundamental rights guaranteed by the first amendment of the United States Constitution.[1] These constitutional interests, which protect the free flow of information, must be balanced against the competing concern for a person's reputation in defamation[2] cases.[3] After the plaintiff in a libel suit proves actual injury to his reputation, a constitutional question of law is raised: Is the statement permissible opinion that is completely protected by the first amendment, or is it a potentially defamatory fact?[4] Courts have had considerable difficulty applying this fact-opinion distinction, particularly when accusations of criminal behavior are involved.[5] Because charges of illegal activity are "blatantly injurious" to reputations,[6] courts must actively prevent the unnecessary subordination of a person's reputational interest to the media's first amendment interests. Therefore, the circumstances surrounding false imputations of illegal behavior must be carefully considered and properly balanced when determining whether the statement is fact or opinion.

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1. *See* U.S. CONST. amend. I. *See also* J. NOWAK, R. ROTUNDA & J.N. YOUNG, CONSTITUTIONAL LAW 830–37 (3d ed. 1986).

2. Defamation may be defined as the unprivileged publication of false communications that naturally and proximately result in an invasion of an individual's right to personal security in reputation and good name. *See generally* RESTATEMENT (SECOND) OF TORTS § 559 (1977) ("A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."); W. PROSSER, W. KEETON, D. DOBBS, R. KEETON & D. OWEN, THE LAW OF TORTS 771, 773 (5th ed. 1984) (Defamation is "an invasion of the interest in reputation and good name, through communication to others which tends . . . to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him."). Defamation law is comprised of the torts of libel and slander. Libel is the "publication of defamatory matter by written or printed words, by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words." RESTATEMENT (SECOND) OF TORTS § 568(1) (1977). Slander is the "publication by defamatory matter by spoken words, transitory gestures or by any form of communication other than those in Subsection (1)." *Id.* § 568(2).

3. *See* L. ELDREDGE, THE LAW OF DEFAMATION 1, 2 (1978). *See also* Rosenblatt v. Baer, 383 U.S. 75, 86 (1966) ("Society has a pervasive and strong interest in preventing and redressing attacks upon reputation. But in cases like the present, there is tension between this interest and the values nurtured by the First and Fourteenth Amendments."); McCabe v. Rattiner, 814 F.2d 839, 841 (1st Cir. 1987).

4. *See* B. SANFORD, LIBEL AND PRIVACY: THE PREVENTION AND DEFENSE OF LITIGATION 107 (1985). *See also infra* notes 17–48 and accompanying text.

5. *See* SANFORD, *supra* note 4, at 107 ("[N]o area of modern libel law can be murkier than the cavernous depths of this [fact-opinion] inquiry."); *see also infra* notes 49–102 and accompanying text.

6. *See* Saenz v. Playboy Enters., 653 F. Supp. 552, 566–67 (N.D. Ill. 1987) ("That a piece is easily identifiable as a work of political criticism and opinion does not, of course, give the writer license to make whopping factual misstatements blantantly injurious to reputations."). *See also* Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring) (noting that reputation has been fairly described as part of "the essential dignity and worth of every human being"); Raymer v. Doubleday & Co., 615 F.2d 241 (5th Cir.), *cert. denied*, 449 U.S. 838 (1980); Privitera v. Town of Phelps, 79 A.D.2d 1, 435 N.Y.S.2d 402 (1981).

In *Scott v. News-Herald*[7] the Ohio Supreme Court applied a fact-opinion test to an accusation of illegal activity.[8] The case adopted a "totality of circumstances" test in order to distinguish fact from opinion.[9] The court held that the article, which accused a public official of perjury, was nonactionable opinion warranting unqualified first amendment protection.[10] The *Scott* majority improperly applied the fact-opinion test and essentially suppressed the rights of the plaintiff in favor of media interests.

Without an accurate assessment of the competing concerns, the goal of the first amendment—achieving the fullest development of man's intellect and spirit—will not be realized.[11] This Case Comment contends that the personal reputational interest of a public figure or public official must be protected in a libel suit by applying a presumption to totality of circumstances analyis: Specific charges of criminal conduct are so inherently factual that these statements cannot be considered opinion unless no reasonable reader would believe the publication was accusing the plaintiff of committing a crime. After a review of the major decisions contributing to the development of the fact-opinion doctrine,[12] this Case Comment will briefly examine the standards used in libel actions concerning allegations of criminal misconduct.[13] Next, the development of Ohio law leading to the *Scott* decision will be discussed.[14] In addition, this Case Comment will discuss the *Scott* case and question the *Scott* court's fact-opinion analysis.[15] In addition, this Case Comment will provide an appropriate application of the totality of circumstances test to defamation actions that concern assertions of criminal conduct.[16] These guidelines will properly safeguard an individual's reputational interest without inhibiting the public dissemination of information.

II. THE FACT-OPINION DOCTRINE IN PERSPECTIVE

A. *The Foundation of the Fact-Opinion Dichotomy*

At common law, fair comment and criticism upon matters of legitimate public interest constituted a defense in defamation actions.[17] In order to invoke the fair comment privilege, most jurisdictions required the defendant to establish initially that the allegedly libelous statement was merely protected opinion and did not constitute

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7. 25 Ohio St. 3d 243, 496 N.E.2d 699 (1986).

8. *See infra* notes 142–48 and accompanying text.

9. Scott v. News-Herald, 25 Ohio St. 3d 243, 250, 496 N.E.2d 699, 706 (1986).

10. *Id.* at 254, 496 N.E.2d at 709.

11. *See* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); Note, *Content Regulation and the Dimensions of Free Expression*, 96 HARV. L. REV. 1854 (1983).

12. *See infra* notes 17–80 and accompanying text.

13. *See infra* notes 81–102 and accompanying text.

14. *See infra* notes 103–23 and accompanying text.

15. *See infra* notes 124–237 and accompanying text.

16. *See infra* notes 238–48 and accompanying text.

17. Generally, the fair comment defense required the defendant to establish the following: 1) the truth of the facts upon which the writer commented; 2) the fairness of the opinion; and 3) the public interest in the matter. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 820 (4th ed. 1971); Note, *Developments in the Law: Defamation*, 69 HARV. L. REV. 875, 925–28 (1956); RESTATEMENT OF TORTS § 606 (1938).

a factual assertion.[18] Statements based on falsely stated facts were not considered opinions that were protected by the fair comment privilege. Furthermore, if the statement implied the existence of unstated defamatory facts not generally known, the fair comment defense was not permitted.[19] These rules were justified on the grounds that an ordinary reader would understand the statements to be existing fact, effectively preventing the person from forming an unbiased conclusion.[20] "In so far as facts are assumed as the basis of the criticism, or untrue allegations of fact are introduced . . . [the statement] does not answer to the description of comment, and is defamation, pure and simple."[21]

The constitutional privilege for opinion, which was established in the landmark case of *New York Times Co. v. Sullivan*,[22] has extinguished the media's need for the fair comment defense in cases concerning public figures.[23] Justice Brennan, writing for a unanimous court in *Sullivan*, determined the applicable standard to be applied

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18. Most courts refused to apply the fair comment privilege to false statements of fact. Thus, the distinction between fact and opinion became crucially important; the defendant's failure to convince the court that the statement constituted opinion would preclude jury consideration of the fair comment defense. Truth was the only defense remaining. *See, e.g.*, Post Publishing Co. v. Hallam, 59 F. 530 (6th Cir. 1893); Kirkland v. Constitution Publishing Co., 38 Ga. App. 632, 144 S.E. 821 (1928), *aff'd*, 169 Ga. 264, 149 S.E. 869 (1929); Cook v. East Shore Newspapers, Inc., 327 Ill. App. 559, 64 N.E.2d 751 (1945); Smith v. Pure Oil Co., 278 Ky. 430, 128 S.W.2d 931 (1939); Bander v. Metropolitan Life Ins. Co., 313 Mass. 337, 47 N.E.2d 595 (1943); Eikhoff v. Gilbert, 124 Mich. 353, 361, 83 N.W. 110, 113 (1900); Van Arsdale v. Time, Inc., 35 N.Y.S.2d 951 (Sup. Ct. 1942), *aff'd mem.*, 265 A.D. 919, 39 N.Y.S.2d 413 (1942). *See also* Carman, Hutchinson v. Proxmire *and the Neglected Fair Comment Defense: An Alternative to "Actual Malice,"* 30 DE PAUL L. REV. 1, 11 (1980); W. HALE, THE LAW OF THE PRESS § 15, at 103 (3d ed. 1948); Veeder, *Freedom of Public Discussion*, 23 HARV. L. REV. 413, 419–22 (1910); Titus, *Statement of Fact Versus Statement of Opinion—A Spurious Dispute in Fair Comment*, 15 VAND. L. REV. 1203, 1203–05 (1962); RESTATEMENT (SECOND) OF TORTS § 566 comment a (1977).

Prior to *Sullivan*, the minority rule held that comment was privileged even if the statement was founded upon an inaccurate or incomplete recitation of the facts. Thus, misstatements of fact concerning public officers or candidates for public office were protected if made for public benefit with an honest belief in their truth. *See* PROSSER, *supra* note 17, at 819–20 nn.6–8. Although the qualified privilege may have discouraged worthy candidates from entering the political arena, these courts reasoned that this harm was outweighed by the public benefit of free access to information. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 280 n.20 (1964). *See also* Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908); R. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS 167 (1980).

19. *See* F. HARPER & F. JAMES, THE LAW OF TORTS 458–60 (1956); RESTATEMENT (SECOND) OF TORTS § 566 comment a (1977).

20. *See id. See also* Eikhoff v. Gilbert, 124 Mich. 353, 83 N.W. 110 (1900).

21. Veeder, *supra* note 18, at 424, *quoted in* HARPER & JAMES, *supra* note 19, at 460. *See also* Eikhoff v. Gilbert, 124 Mich. 353, 83 N.W. 110 (1900). A circular accused an incumbent politician of "champion[ing] measures opposed to the moral interests of the community." The unstated reference related to the candidate's endorsement of antitemperance legislation. The fair comment privilege did not apply because the readers could only speculate as to the underlying facts supporting the conclusion. *Id.* at 354–61, 83 N.W. at 111–13.

22. 376 U.S. 254 (1964).

23. Most states held that a person who published a false and defamatory statement without *reasonable grounds* for believing it to be true could not rely on the fair comment privilege. *See* ELDREDGE, *supra* note 3, at 451; RESTATEMENT OF TORTS § 601 (1938). Hence, the proof required to establish the plaintiff's cause of action (reckless disregard of the truth for plaintiffs who are public officals or public figures) would always eliminate any fair comment defense. *See* ELDREDGE, *supra* note 3, at 451. *See also infra* notes 24–27 and accompanying text.

Some courts have suggested that the common-law doctrine of fair comment has been obviated by the Supreme Court's constitutionalization of broader, stronger first amendment defenses. *See, e.g.*, Ollman v. Evans, 750 F.2d 970, 975 n.8 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985) ("Although [the] claim arises under the District of Columbia common law of libel, . . . the issue whether the allegedly libelous statements are protected opinion is to be decided as a matter of federal constitutional law." (citing Lewis v. Time, Inc., 710 F.2d 549, 552–53 (9th Cir. 1983)). *See also* Yerkie v. Post-Newsweek Stations, 470 F. Supp. 91, 94 (D. Md. 1979); Hoffman v. Washington Post Co., 433 F. Supp. 600, 603 (D.D.C. 1977), *aff'd without opinion*, 578 F.2d 442 (D.C. Cir. 1978); Bucher v. Roberts, 198 Colo. 1, 595 P.2d 239 (1979); Naked City, Inc. v. Chicago Sun-Times, 77 Ill. App. 3d 188, 395 N.E.2d 1042 (1979); Mashburn v. Collin, 355 So. 2d 879, 891 (La. 1977).

to defamation actions brought by public officials when there is "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open . . . ."[24] In order to encourage unrestrained debate on matters of public importance, the Court held that under the first and fourteenth amendments a qualified privilege must apply to both statements of fact and opinion.[25] Hence, any distinction between fact and opinion seemed to be irrelevant in applying a qualified first amendment privilege to statements about public officials. Defamatory falsehoods concerning a matter of public importance were permissible when made without actual malice.[26] In other words, a newspaper would be liable in a defamation action only if it published a statement relating to official conduct with knowledge of falsity or reckless disregard of the truth.[27]

The fact-opinion distinction reemerged with new significance in *Gertz v. Robert Welch, Inc.*[28] The Supreme Court held that a private person does not have to prove that the defendant published the statement with actual malice in order to recover in a libel action.[29] *Gertz* permitted the states to impose any standard of care other than strict liability whenever private individuals were involved.[30] Justice Powell, writing for the majority, also elaborated on the fact-opinion distinction:

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24. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

25. *Id.* at 279–80. Any statement of fact or opinion protected by the fair comment defense was privileged if made without actual malice. *Sullivan* essentially elevated the fair comment doctrine to a constitutional privilege: "Since the Fourteenth Amendment requires recognition of the conditional privilege for honest misstatements of fact, it follows that a defense of fair comment must be afforded for honest expression of opinion based upon privileged, as well as true, statements of fact." *Id.* at 292 n.30. Thus, protected comments needed to address an issue of public interest and be made with a good faith belief as to their truth. *See supra* note 18.

26. New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

27. *Id.*

28. 418 U.S. 323 (1974). The case was indirectly related to the death of a Chicago youth. The boy's family retained attorney Robert Gertz to initiate a civil suit against Richard Nuccio, a policeman later convicted for murdering the youth. *American Opinion*, the John Birch Society's monthly magazine, published an article accusing Gertz of framing the Chicago policeman, of having a criminal record, and of maintaining communist sympathies. The United States District Court held that Gertz, a private citizen, must show actual malice as required by *Sullivan*. The Seventh Circuit Court of Appeals affirmed the decision, and Gertz appealed to the Supreme Court. *Id.* at 325–32.

29. *Id.* at 347. A public official must prove that defamatory comments relating to matters of public concern were made with actual malice. This standard applies to public figures as well. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). In contrast, defamatory remarks concerning a private-figure plaintiff and a matter of private concern are redressable absent a showing of actual malice. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985). However, a private-figure plaintiff has the burden of proving falsity when the media defendant's speech concerns a matter of public interest. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 777 (1986). Because a public official or figure is required to prove actual malice—whether the statement was made with knowledge that it was false or with reckless disregard of whether it was false or not—these plaintiffs arguably have the burden of proving falsity. *Id.* (The *Hepps* Court noted in dictum that one might expect a public-figure plaintiff to show the falsity of the statements at issue in order to prevail on a suit for defamation in light of *Sullivan*.). *See also* New York Times Co. v. Sullivan, 376 U.S. 254, 285–86 (1964); Note, *Structuring Defamation Law to Eliminate the Fact-Opinion Determination: A Critique of* Ollman v. Evans, 71 IOWA L. REV. 913, 932 n.172 (1986) [hereinafter Note, *Structuring Defamation Law*]. Proof of actual malice would not make sense "if the statement was in fact true or could not be characterized as being either true or false." Franklin & Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 825, 855 (1984). However, the issue has not been conclusively addressed by the Supreme Court. *See* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 788 n.10 (1986) (Stevens, J., dissenting) ("If the issue were properly before us, I would be inclined to the view that public figures should not bear the burden of disproving the veracity of accusations made against them with 'actual malice,' as the *New York Times* Court used that term. . . . [T]he constitutional value in truthful statements . . . [does not require] any more protection of defamatory utterances whose truth may not be ascertained than is provided by the *New York Times* test.").

30. Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974).

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues.[31]

Hence, no matter how opprobrious or unreasonable an expression of pure opinion may appear, it is not actionable. The expression of ideas, unlike false statements of fact, receives unqualified constitutional protection.[32] Courts have interpreted this dictum as "a bright line demarcating when defamation law must give way to the mandates of the first amendment."[33] The dichotomy, however, has not been easily distinguished.[34] Thus, courts have turned to two Supreme Court cases for guidance.

The *Greenbelt Cooperative Publishing Association v. Bresler*[35] decision concerned a newspaper article that described a public city council meeting in which it was correctly stated that some people characterized the plaintiff developer's negotiating position as "blackmail."[36] The Court found that publication of the word was not defamatory in light of the heated debate and the complete, accurate report of the plaintiff's proposal.[37] However, the Court implied that the use of the word "blackmail" could constitute libel if the statement was a false accusation of criminal extortion rather than rhetorical hyperbole.[38] Courts have interpreted this case to mean that statements must be examined in the context of the article in which they appear.[39]

The second Supreme Court decision, *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin*,[40] relied on the *Gertz* dictum.[41] The case concerned a union newsletter that defined a "scab" as a "traitor to his God, his country, his family, and his class."[42] The Court held that this language was not fact, reasoning that the statement was made in "a loose, figurative sense" to emphasize the opposition to anti-unionization views.[43] The Court concluded that "[e]xpression of such opinion, even in the most pejorative terms, is protected under federal labor

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31. *Id.* at 339–40 (footnote omitted) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)). Presumably, Justice Powell was considering statements of "pure" opinion. These comments are accompanied by a statement of facts upon which they are based. On the other hand, a statement of "mixed" opinion implies a factual justification unknown to its receivers. "To say of a person that he is a thief, without explaining why, may, depending upon the circumstances, be found to imply the assertion that he has committed acts that come within the common connotation of thievery." RESTATEMENT (SECOND) OF TORTS § 566 comment b (1977).

32. "Unconditional" or "unqualified" first amendment protection is reserved for statements of opinion. "Conditional" or "qualified" privilege is afforded to statements that are characterized as factual. Thus, expressions of fact concerning public officials are not protected when made with actual malice. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

33. *See* McCabe v. Rattiner, 814 F.2d 839, 841 (1st Cir. 1987).

34. *See* Ollman v. Evans, 750 F.2d 970, 978 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985).

35. 398 U.S. 6 (1970).

36. *Id.* at 7.

37. *Id.* at 14.

38. *Id.* at 14 & n.7 ("No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense.").

39. *See, e.g.*, McCabe v. Rattiner, 814 F.2d 839, 842 (1st Cir. 1987).

40. 418 U.S. 264 (1974).

41. *Id.* at 284.

42. *Id.* at 268.

43. *Id.* at 284.

law."[44] This case is important precedent because it expands the significance of the context in which the statement was expressed.[45]

The *Greenbelt-Gertz-Letter Carriers* trilogy stands for the proposition that expressions of opinion are protected by the first amendment in defamation actions and, therefore, the distinction between fact and opinion is necessary.[46] The question of whether a particular statement should be classified as a nonactionable opinion or an actionable fact has been answered differently by the courts.[47] However, a number of courts have indicated that these Supreme Court decisions imply that allegations of criminal conduct warrant special consideration.[48]

B. *Current Interpretations of the Fact-Opinion Distinction*

Virtually all state and federal courts have interpreted the *Gertz* "no false opinion" dictum to have elevated the distinction between fact and opinion to constitutional principle.[49] However, the Supreme Court precedents have not outlined a definitive test for distinguishing between fact and opinion, and the Court has provided little guidance on the proper method of balancing a statement that has elements of both fact and opinion. Nevertheless, the Supreme Court has indicated that differentiating between fact and opinion remains an important consideration in libel law today.[50] Not surprisingly, the problem has spawned a variety of interpretations.[51]

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44. *Id.*

45. *See* McCabe v. Rattiner, 814 F.2d 839, 842 (1st Cir. 1987).

46. *See* SANFORD, *supra* note 4, at 112.

47. *See infra* notes 51–52. *See also* Note, *The Fact-Opinion Distinction in First Amendment Libel Law: The Need for a Bright-Line Rule*, 72 GEO. L.J. 1817 (1984) [hereinafter Note, *The Fact-Opinion Distinction*]; Note, *Fact and Opinion After* Gertz v. Robert Welch, Inc.: *The Evolution of a Privilege*, 34 RUTGERS L. REV. 81 (1981) [hereinafter Note, *Fact and Opinion After* Gertz].

48. *See infra* notes 88 and 94 and accompanying text.

49. *See, e.g.*, Potomac Valve & Fitting Inc. v. Crawford Fitting Co., 829 F.2d 1280, 1286 (4th Cir. 1987) ("The constitutional distinction between fact and opinion is now firmly established in the case law of the circuits."); McCabe v. Rattiner, 814 F.2d 839, 841 (1st Cir. 1987); Ollman v. Evans, 750 F.2d 970, 975 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985) ("*Gertz*'s implicit command thus imposes upon both state and federal courts the duty as a matter of constitutional adjudication to distinguish facts from opinions . . . .").

50. *See, e.g.*, Ollman v. Evans, 471 U.S. 1127 (1985) (Rehnquist, J., and Burger, C.J., dissenting from denial of certiorari). The now Chief Justice Rehnquist wrote:

> [I]t is apparent from the cases cited by petitioner that lower courts have seized upon the word "opinion" in the second sentence [of the *Gertz* dictum] to solve with a meat axe a very subtle and difficult question, totally oblivious "of the rich and complex history of the struggle of the common law to deal with this problem."

Id. at 1129 (quoting Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1239 (1976)).

Moreover, the fact-opinion distinction has been criticized by many commentators as being more "announced than defined." *See* Note, *Fair Comment*, 62 HARV. L. REV. 1207, 1212 (1949). *See also* Carman, *supra* note 18, at 12; 7 J. WIGMORE, EVIDENCE § 1919 (Chadbourn rev. 1978); Note, *The Fact-Opinion Distinction*, *supra* note 47; 1 HARPER & JAMES, *supra* note 19, at 458; Note, *Structuring Defamation Law*, *supra* note 29; PROSSER, *supra* note 17, at 820; SACK, *supra* note 18, at 155; Hallen, *Fair Comment*, 8 TEX. L. REV. 41, 53 (1929); Titus, *supra* note 18, at 1221.

Nevertheless, the Supreme Court continues to cite the distinction favorably. *See* Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984). The case concerned a critical review of Bose loudspeakers in *Consumer Reports*. After citing the *Gertz* fact-opinion dictum, the Court noted that the statements at issue "tread the line between fact and opinion." Although the Court did not specifically characterize the article as opinion, Justice Stevens explained that the critique "represents the sort of inaccuracy that is commonplace in the forum of robust debate to which the *New York Times* rule applies." *Id.* at 514, 513. *See also* Hustler Magazine Inc. v. Falwell, 56 U.S.L.W. 4180, 4181 (U.S. Feb. 24, 1988) (No. 86–1278) ("False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective.").

51. *See* Ollman v. Evans, 750 F.2d 970, 977–78 & nn.12–13 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127

1. *The Totality of Circumstances Test*

Recently, many courts have adopted the "totality of circumstances" test that was outlined by Judge Starr of the D.C. Circuit in *Ollman v. Evans*.[52] The case stemmed from a syndicated newspaper column by Rowland Evans and Robert Novak that questioned the nomination of Bertell Ollman, an avowed Marxist professor, to chair the University of Maryland's Department of Politics and Government.[53] Ollman contended that several of the statements and innuendos concerning his reputation were defamatory. These remarks suggested that he was more a political activist intent on converting students to Marxism than a scholar respected in his profession.[54] Evans and Novak refused Ollman's request for a retraction. After Ollman was denied the chairmanship, he filed suit against the journalists.[55]

Ollman contended that the allegedly false and defamatory statements resulted in his loss of the chairmanship, damaged his reputation as a scholar, and caused him

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(1985). The Ninth Circuit has adopted a totality of circumstances test in Information Control Corp. v. Genesis One Computer Corp., 611 F.2d 781 (9th Cir. 1980). The three part test holds that statements which " . . . convey pertinent information to the public about a matter of public interest . . . are made in the course of public debate or similar circumstances, and . . . are phrased in cautionary language" are opinion. *See* Murray v. Bailey, 613 F. Supp. 1276, 1282 (N.D. Cal. 1985). *See also* Flotech, Inc. v. E.I. Du Pont de Nemours & Co., 814 F.2d 775 (1st Cir. 1987); Keller v. Miami Herald Publishing Co., 778 F.2d 711 (11th Cir. 1985); Dworkin v. Hustler Magazine, Inc., 668 F. Supp. 1408 (C.D. Cal. 1987); Ault v. Hustler, 13 Media L. Rep. (BNA) 2232 (D. Or. 1987); King v. Globe Newspaper Co., 12 Media L. Rep. (BNA) 2361 (Mass. Super. Ct. 1986), *aff'd in part, rev'd in part*, 400 Mass. 705, 512 N.E.2d 241 (1987); Aldoupolis v. Globe Newspaper Co., 398 Mass. 731, 500 N.E.2d 794 (1986).

The First Circuit has recently adopted another totality of circumstances test to distinguish fact from opinion that examines the following: 1) the statement itself; 2) the article as a whole; and 3) the social context. McCabe v. Rattiner, 814 F.2d 839 (1st Cir. 1987). *See also* Catalfo v. Jensen, 657 F. Supp. 463 (D.N.H. 1987); Fudge v. Penthouse Int'l, Ltd., 14 Media L. Rep. (BNA) 1238 (D.R.I. 1987).

A number of courts rely on the *Restatement (Second) of Torts* to distinguish fact from opinion. An expression is actionable if it implies undisclosed defamatory facts because a reader would not be able to assess independently the reasonableness of the statement. RESTATEMENT (SECOND) OF TORTS § 566 & comments (1977). *See, e.g.*, Koch v. Goldway, 817 F.2d 507 (9th Cir. 1987); Orr v. Argus-Press Co., 586 F.2d 1108, 1115 (6th Cir. 1978), *cert. denied*, 440 U.S. 960 (1979); Hotchner v. Castillo-Puche, 551 F.2d 910, 913 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977); Burns v. McGraw-Hill Broadcasting Co., 659 P.2d 1351 (Colo. 1983); O'Donnell v. Field Enter., Inc., 145 Ill. App. 3d 1032, 491 N.E.2d 1212 (1986); Nash v. Keene Publishing Corp., 127 N.H. 214, 498 A.2d 348 (1985); Karnell v. Campbell, 206 N.J. Super. 81, 501 A.2d 1029 (1985); Chalpin v. Amordian Press, 128 A.D.2d 81, 515 N.Y.S.2d 434 (1987); Healey v. New England Newspapers, Inc., 520 A.2d 147 (R.I. 1987).

52. 750 F.2d 970 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985). The *Ollman* test has been adopted in a number of jurisdictions. *See* Potomac Valve & Fitting Inc. v. Crawford Fitting Co., 829 F.2d 1280 (4th Cir. 1987); Brown & Williamson Tobacco Corp. v. Jacobson, 827 F.2d 1119 (7th Cir. 1987); Woods v. Evansville Press Co., 791 F.2d 480 (7th Cir. 1986); Janklow v. Newsweek, Inc., 788 F.2d 1300 (8th Cir. 1985), *cert. denied*, 107 S. Ct. 272 (1986); Mr. Chow of New York v. Ste. Jour Azur S.A., 759 F.2d 219 (2d Cir. 1985); Haigh v. Matsushita Elec. Corp. of Am., No. 87-0455-R, slip op. (E.D. Va. Dec. 28, 1987) (LEXIS, Federal library, Omni file); Henderson v. Times Mirror Co., 669 F. Supp. 356 (D. Colo. 1987); Pearce v. E.F. Hutton Group, Inc., 664 F. Supp. 1490 (D.D.C. 1987); Saenz v. Playboy Enters., 653 F. Supp. 552 (N.D. Ill. 1987); Liberty Lobby v. Dow Jones Co., 638 F. Supp. 1149 (D.D.C. 1986); Karp v. Hill & Knowlton, Inc., 631 F. Supp. 360 (S.D.N.Y. 1986); Price v. Viking Press, Inc., 625 F. Supp. 641 (D. Minn. 1985); Riley v. Moyed, 13 Media L. Rep. (BNA) 1420 (Del. Super. Ct. 1986), *aff'd*, 529 A.2d 248 (Del. 1986); Yancey v. Hamilton, 14 Media L. Rep. (BNA) 1319 (Ky. Cir. Ct. 1987); Henry v. Halliburton, 690 S.W.2d 775 (Mo. 1985) (en banc); Scott v. News-Herald, 25 Ohio St. 3d 243, 496 N.E.2d 699 (1986); Brasher v. Carr, No. C14-86-753-CV, slip op. (Tex. Ct. App. Nov. 12, 1987) (LEXIS, States library, Texas file); El Paso Times, Inc. v. Kerr, 706 S.W.2d 797 (Tex. Ct. App. 1986), *cert. denied*, 107 S. Ct. 1570 (1987). *See also* Note, *The Fact Opinion Dilemma in First Amendment Defamation Law*, 13 WM. MITCHELL L. REV. 545 (1987) [hereinafter Note, *The Fact-Opinion Dilemma*]; Note, *Structuring Defamation Law*, *supra* note 29; Note, *Defamation–Actionable Statement of Fact Versus Privileged Opinion*: Ollman v. Evans, 34 U. KAN. L. REV. 367 (1985).

53. Ollman v. Evans, 750 F.2d 970, 971–72 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985).

54. *Id.* at 972–73.

55. *Id.* at 973.

mental anguish.[56] The United States District Court for the District of Columbia[57] entered summary judgment for the defendants, holding that the entire article was constitutionally protected opinion, including a quote from an anonymous colleague that the professor had "no status" among his peers in his discipline.[58] In a per curiam opinion, a three-judge panel for the United States Court of Appeals for the District of Columbia reversed and remanded the case for further proceedings.[59] Two months later, however, the court of appeals voted to vacate this decision and rehear the case en banc. In early 1985 the court affirmed the lower court's decision to grant summary judgment for the defendants in a six to five decision.[60] The Supreme Court denied certiorari.[61]

Reflecting the difficulty in distinguishing statements of fact from statements of opinion, nine justices on the court of appeals wrote separate opinions. However, eight justices interpreted the *Gertz* dictum to mandate the fact-opinion distinction, and they generally agreed with Judge Starr's test.[62] This totality of circumstances test has the following four branches: 1) whether the common usage and meaning of the allegedly defamatory statements have a precise meaning that gives rise to factual implications; 2) whether the statement is capable of objective verification; 3) whether the general linguistic context of the statement transforms an ostensibly factual statement into opinion; and 4) whether the broader social context in which the statement appears indicates the statement is opinion.[63]

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56. Ollman v. Evans, 479 F. Supp. 292, 292 (D.D.C. 1979), *aff'd*, 750 F.2d 970 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985).

57. *Id.*

58. *Id.* at 294.

59. Ollman v. Evans, 713 F.2d 838, 839 (D.C. Cir. 1983) (per curiam), *vacated*, 750 F.2d 970 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985).

60. Ollman v. Evans, 750 F.2d 970, 970–71 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985).

61. Ollman v. Evans, 471 U.S. 1127 (1985).

62. Judge Starr, joined by Judge Tamm, wrote the majority opinion. Judge Bork, concurring in the result but outlining additional considerations, was joined by Judges Wilkey, Ginsburg, and Senior Circuit Judge MacKinnon. Dissenting in part was Chief Judge Robinson and Judges Wright, Wald, Edwards, and Scalia. Ollman v. Evans, 750 F.2d 970, 971 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985).

63. *Id.* at 979. Note that Judge Starr rejected the "undisclosed facts" rationale promulgated by the *Restatement* because it is unnecessary if the four-factor analysis is employed properly:

> The definiteness and verifiability of a statement (factors one and two) clearly bear on the ability of a statement to carry factual implications. The linguistic and social context of the statement (factors three and four) will also influence the average reader's readiness to infer from the statement the existence of undisclosed facts. Thus, once our inquiry into whether the statement is fact or expression of opinion has concluded, the factors militating either in favor of or against the drawing of factual implications have already been identified. A separate inquiry into whether a statement, already classified in this painstaking way as opinion, implies allegedly defamatory facts, would, in our view, be superfluous.

Id. at 985.

Nevertheless, a number of courts consider *Restatement* § 566 in conjunction with the totality of circumstances tests. *See, e.g.*, Kelly v. Schmidberger, 806 F.2d 44 (2d Cir. 1986); Keller v. Miami Herald Publishing Co., 778 F.2d 711 (11th Cir. 1985); Mr. Chow of New York v. Ste. Jour Azur S.A., 759 F.2d 219 (2d Cir. 1985); Price v. Viking Press, Inc., 625 F. Supp. 641 (D. Minn. 1985); Baker v. Los Angeles Herald Examiner, 42 Cal. 3d 254, 721 P.2d 87, 228 Cal. Rptr. 206 (1986); El Paso Times, Inc. v. Kerr, 706 S.W.2d 797 (Tex. Ct. App. 1986), *cert. denied*, 107 S. Ct. 1570 (1987); Long v. Egnor, 346 S.E.2d 778 (W. Va. 1986); Note, *The Fact-Opinion Dilemma*, *supra* note 52.

2. *The Public, Political Controversy Component*

In his concurring opinion in *Ollman*, Judge Bork rejected the "rigid" four factor test and adopted a balancing approach.[64] Part of this balancing inquiry focuses on weighing the particular first amendment concerns implicated by the case, that is, whether the plaintiff had entered the public, political arena. According to Judge Bork, a reader would expect a statement made in the heated debate of a political controversy to be more hyperbolic than factual.[65] Moreover, persons in the political arena should expect this criticism. Thus, the first amendment should protect these statements.[66]

The public, political arena principle is closely related to the fourth prong of the totality of circumstances test.[67] Courts that have adopted Judge Starr's analysis sometimes incorporate the public, political context analysis when examining the broad social setting in which the statement appeared.[68] The Eighth Circuit adopted this approach in *Janklow v. Newsweek, Inc.*[69] The case stemmed from a defamation action brought by Governor William Janklow of South Dakota against *Newsweek* magazine. The publication reported that eight months after the then Attorney General Janklow had been charged with assault, he "was prosecuting" the party who brought the charge for an unrelated crime.[70]

Using the totality of circumstances test, the *Janklow* court concluded that the statement was opinion.[71] Judge Arnold, writing for the majority, began the analysis by emphasizing that no single factor is dispositive and that the ultimate resolution of the fact-opinion question must be founded upon consideration of all the circumstances.[72] The court found that the imputation of vengeance was not a precise or verifiable accusation of criminal malfeasance in office.[73] Moreover, the literary context of the statement would have signaled the reader to expect some opinion despite its placement in a hard news section of *Newsweek*.[74] Last, the court incorporated Judge Bork's concept of a "public, political arena" into the fourth prong of the test as elucidated by Judge Starr.[75] The majority noted that this "public context" would determine whether the statement involved "core values of the First Amendment."[76]

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64. Ollman v. Evans, 750 F.2d 970, 993 (D.C. Cir. 1984) (Bork, J., concurring), *cert. denied*, 471 U.S. 1127 (1985).

65. *Id.* at 1002 (Bork, J., concurring).

66. *Id. See also* Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984). Judge Bork's analysis follows the Supreme Court's concern for the "forum of robust debate" when analyzing the fact-opinion determination. *Id.* at 513.

67. Ollman v. Evans, 750 F.2d 970, 1016 (D.C. Cir. 1984) (MacKinnon, J., concurring), *cert. denied*, 471 U.S. 1127 (1985).

68. *See, e.g.*, Janklow v. Newsweek, Inc., 788 F.2d 1300 (8th Cir.), *cert. denied*, 107 S. Ct. 272 (1986); Henry v. Halliburton, 690 S.W.2d 775 (Mo. 1985) (en banc).

69. 788 F.2d 1300 (8th Cir.), *cert. denied*, 107 S. Ct. 272 (1986). *See also* Note, *Will Words Never Hurt?*—Janklow v. Newsweek, Inc., 19 CREIGHTON L. REV. 1015 (1986); Note, *Confusion Persists in the Distinction Between Fact and Opinion in Defamation Actions*, 54 UMKC L. REV. 704 (1986).

70. Janklow v. Newsweek, Inc., 788 F.2d 1300, 1301 (8th Cir.), *cert. denied*, 107 S. Ct. 272 (1986).

71. *Id.* at 1302–05.

72. *Id.* at 1302.

73. *Id.* at 1303–04.

74. *Id.* at 1304.

75. *Id.* at 1303.

76. *Id.*

Consequently, the *Janklow* court concluded that the free flow of information about the government and its officers implicates core first amendment values.[77] Furthermore, the court noted that it is "vital to our form of government that press and citizens alike be free to discuss, and if they see fit, impugn the motives of public officials."[78] Because the statement at issue merely criticized the motives and intentions of a prominent government official relating to an issue of public interest, the first amendment implications inherent in the public, political arena indicated that the statement was constitutionally protected opinion.[79] In conclusion, however, the court was careful to note that the concept of actionable fact would have been particularly applicable to accusations of actual criminal conduct against public officials.[80]

3. *The Criminal Conduct Distinction*

The current interpretation of the first amendment permits newspapers to comment freely on the actions of government, public figures, and other public persons. However, a number of courts recognize the potentially serious damage and vindictive consequences arising from an accusation of criminal conduct and give these statements special consideration in defamation actions.[81] In these jurisdictions, defamatory falsehoods that manifestly impute illegal behavior do not warrant unqualified first amendment protection given to statements of opinion; instead, direct assertions of illegal activity are treated by these courts as inherently factual statements.[82] Thus, these factual accusations of criminal conduct are afforded the qualified protection of the *Sullivan* actual malice test when they concern public figures or officials and always must be proven false.[83]

The special treatment given to criminal conduct allegations stems from the concept of slander per se.[84] The common-law rule maintains that:

> One who publishes a slander which imputes to the plaintiff the commission of a crime which if committed at the place of publication would be (1) punishable by death or

77. *Id.* at 1304.

78. *Id.* at 1305.

79. *Id.*

80. *Id.* at 1305 n.6.

81. *See infra* notes 88, 94. *See also* Note, *Fact and Opinion After* Gertz, *supra* note 47, at 114–16.

82. *See infra* notes 88, 94.

83. *See supra* note 29.

84. Words deemed defamatory without proof of special damages are deemed slanderous per se. Slander per se consists of the following four classifications: 1) words imputing a criminal offense; 2) words imputing certain diseases; 3) words imputing a woman's unchastity; and 4) words disparaging a person in his business, trade, profession, or office. *See generally* ELDREDGE, *supra* note 3, at 94–150.

Published statements that have defamatory meaning on the face of the communication are libelous per se. No pleading or proof of special damages is necessary. The cause of action only requires the plaintiff to prove that the libel concerned him and that he has suffered "actual injury" as defined in *Gertz*. On the other hand, a statement that is defamatory only in light of extrinsic facts known by the recipient is called libel *per quod*, and it may be actionable only with the proof of special damages. *See* ELDREDGE, *supra* note 3, at 93–94; SACK, *supra* note 18, at 97. *See also* Shifflet v. Thomson Newspapers, 69 Ohio St. 2d 179, 431 N.E.2d 1014 (1982). Many jurisdictions maintain the distinction despite the *Restatement*'s position that the distinction is obsolete. *See* RESTATEMENT (SECOND) OF TORTS § 569 comment b (1977).

imprisonment in a state or federal institution, or (2) regarded by public opinion as involving moral turpitude, is subject to liability without proof of special harm.[85]

For example, a false imputation of perjury, which is clearly understood as a criminal accusation by the average person in light of all the surrounding circumstances, would constitute slander per se.[86] The rationale for making imputations of criminal conduct slanderous per se is that these charges are manifestly damaging statements which "expose the plaintiff to obloquy and social criticism."[87]

State courts have distinguished criminal conduct accusations from other defamatory statements.[88] In 1977 the highest court of New York recognized the particularly

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85. ELDREDGE, *supra* note 3, at 99.

An allegation of illegal behavior is slanderous per se under *Restatement (Second) of Torts* § 571 (1977) if the crime involves moral turpitude or is punishable in the first instance by confinement. *See, e.g.*, Chamberlin v. 101 Realty, Inc., 626 F. Supp. 865 (D.N.H. 1985); Marcone v. Penthouse Int'l, Ltd., 533 F. Supp. 353 (E.D. Pa. 1982); Korry v. International Tel. & Tel. Corp., 444 F. Supp. 193 (S.D.N.Y. 1978); Dorr v. C.B. Johnson, Inc., 660 P.2d 517 (Colo. App. 1983); Danahy v. Meese, 84 A.D.2d 670, 446 N.Y.S.2d 611 (1981); Wecht v. PG Publishing Co., 353 Pa. Super. 493, 510 A.2d 769 (1986), *appeal denied*, 514 Pa. 632, 522 A.2d 559 (1987); Gulf Atl. Life Ins. Co. v. Hurlbut, 696 S.W.2d 83 (Tex. Civ. App. 1985); Great Coastal Exp., Inc. v. Ellington, 230 Va. 142, 334 S.E.2d 846 (1985); Starobin v. Northridge Lakes Dev. Co., 94 Wis. 2d 1, 287 N.W.2d 747 (1980); Converters Equip. Corp. v. Condes Corp., 80 Wis. 2d 257, 258 N.W.2d 712 (1977).

Restatement (Second) of Torts § 569 (1977), which addresses libelous criminal accusations, is even broader than section 571:

> [I]f the imputation of crime is defamatory as described in § 559 [Defamatory Communication Defined], it is immaterial that the crime charged does not involve moral turpitude or that it is not punishable by imprisonment. It is enough that the crime is of a character such as to harm the reputation of the person charged with it in the eyes of a substantial minority of respectable persons.

See, e.g., Afro-American Publishing Co. v. Jaffe, 366 F.2d 649 (D.C. Cir. 1966); Chamberlin v. 101 Realty, Inc., 626 F. Supp. 865 (D.N.H. 1985); Marcone v. Penthouse Int'l, Ltd., 533 F. Supp. 353 (E.D. Pa. 1982); Fram v. Yellow Cab Co. of Pittsburgh, 380 F. Supp. 1314 (W.D. Pa. 1974); Hogan v. New York Times Co., 211 F. Supp. 99 (D. Conn. 1962), *aff'd*, 313 F.2d 354 (2d Cir. 1963); Rowe v. Metz, 195 Colo. 424, 579 P.2d 83 (1978); Proto v. Bridgeport Herald Corp., 136 Conn. 557, 72 A.2d 820 (1950); Pollitt v. Brush-Moore Newspapers, Inc., 214 Md. 570, 136 A.2d 573 (1957); Hester v. Barnett, 723 S.W.2d 544 (Mo. App. 1987); Agriss v. Roadway Express, Inc., 334 Pa. Super. 295, 483 A.2d 456 (1984); Wilson v. Benjamin, 332 Pa. Super. 211, 481 A.2d 328 (1984); Baird v. Dun & Bradstreet, 446 Pa. 266, 285 A.2d 166 (1971); Ward v. Painters' Local Union No. 300, 41 Wash. 2d 859, 252 P.2d 253 (1953).

86. *See, e.g.*, Dorr v. United States, 195 U.S. 138 (1904). Justice Day quoted with approval from NEWELL ON DEFAMATION, LIBEL AND SLANDER § 163, at 556–57 (1890): "The publisher must add nothing of his own [when giving an account of judicial proceedings]. He must not state his opinion of the conduct of the parties, or impute motives therefor; he must not insinuate that a particular witness committed perjury." *Id.* at 152. *See also* Sivelle v. Maloof, 373 F.2d 520 (1st Cir. 1967); Riss v. Anderson, 304 F.2d 188 (8th Cir. 1962); Owner's Adjustment Bureau, Inc. v. Ott, 402 So. 2d 466 (Fla. App. 1981); Fireman's Fund Ins. Co. v. Riley, 294 So. 2d 59 (Fla. App. 1974); Atlanta News Publishing Co. v. Medlock, 123 Ga. 714, 51 S.E. 756 (1905); Hodges v. Tomberlin, 170 Ga. App. 842, 319 S.E.2d 11 (1984); Fried v. Jacobson, 99 Ill. 2d 24, 457 N.E.2d 392 (1983); Rennier v. State, Through Dept. of Pub. Safety, 428 So. 2d 1261 (La. App. 1983); Smith v. Hubbell, 142 Mich. 637, 106 N.W. 547 (1906); Henry v. Collins, 253 Miss. 34, 158 So. 2d 28 (1963), *rev'd on other grounds*, 380 U.S. 356 (1965); Hall v. Brookshire, 364 Mo. 774, 267 S.W.2d 627 (1954); Fenning v. S.G. Holding Corp., 47 N.J. Super. 110, 135 A.2d 346 (1957); Loudin v. Mohawk Airlines, Inc., 27 A.D.2d 517, 275 N.Y.S.2d 359 (1966); Linehan v. Nelson, 197 N.Y. 482, 90 N.E. 1114 (1910); Gudger v. Penland, 108 N.C. 593, 13 S.E. 168 (1891); Bray v. Providence Journal Co., 101 R.I. 111, 220 A.2d 531 (1966); Carey v. Hearst Publications, 19 Wash. 2d 655, 143 P.2d 857 (1943).

87. ELDREDGE, *supra* note 3, at 99–100 (footnotes omitted). *See* Lawrence v. Bauer Publishing & Printing Ltd., 89 N.J. 451, 446 A.2d 469, *cert. denied*, 459 U.S. 999 (1982).

88. *See, e.g.*, McCoy v. Hearst Corp., 174 Cal. App. 3d 892, 220 Cal. Rptr. 848, *rereported*, 184 Cal. App. 3d 277 (1985), *superseded*, 42 Cal. 3d 835, 727 P.2d 711, 231 Cal. Rptr. 518 (1986); Gregory v. McDonnell Douglas Corp., 17 Cal. 3d 596, 552 P.2d 425, 131 Cal. Rptr. 641 (1976) (in dictum, citing cases holding accusations of criminal conduct do not warrant first amendment protection); Lane v. Arkansas Valley Publishing Co., 675 P.2d 747 (Colo. App. 1983), *cert. denied*, 467 U.S. 1252 (1984); Palm Beach Newspapers v. Early, 334 So. 2d 50 (Fla. 1976), *cert. denied and appeal dismissed*, 354 So. 2d 351 (Fla. 1977), *cert. denied*, 439 U.S. 910 (1978) (superintendent of schools charged with cheating or stealing); Catalano v. Pechous, 83 Ill. 2d 146, 419 N.E.2d 350 (1980), *cert. denied*, 451 U.S. 911 (1981) (accusing aldermen of taking bribes); Economy Carpets Mfrs. & Distribs., Inc. v. Better Business Bureau of Baton Rouge Area, Inc., 361 So. 2d 234, 241 (La. App. 1978), *cert. denied*, 440 U.S. 915 (1979) (in dictum, recognizing that false

serious nature of these defamatory remarks in *Rinaldi v. Holt, Rinehart & Winston, Inc.*[89] A state trial judge brought a defamation suit against the publishers of a book that characterized him as "'incompetent,' 'probably corrupt,' and 'suspiciously lenient.'"[90] The charge of incompetence was found to be a constitutionally protected expression of opinion. However, the other allegations were defamatory statements of fact.[91] These accusations were not imprecise hyperbole used to indicate disagreement with the plaintiff's decisions. Rather, the court held that a reasonable reader would interpret the words, in the context of the entire article, to mean that the plaintiff engaged in illegal and unethical activities.[92] The court explained that statements imputing a crime are inherently factual when undisclosed facts are implied:

> Accusations of criminal activity, even in the form of opinion, are not constitutionally protected. While inquiry into motivation is within the scope of absolute privilege, outright charges of illegal conduct, if false, are protected solely by the actual malice test. As noted by the Supreme Court of California, there is a critical distinction between opinions which attribute improper motives to a public officer and accusations, in whatever form, that an individual has committed a crime or is personally dishonest. No First Amendment protection enfolds false charges of criminal behavior.[93]

Federal courts have also noted that an imputation of a criminal offense warrants special treatment when considering the fact-opinion dichotomy.[94] *Cianci v. New Times Publishing Company*,[95] decided by the Second Circuit in 1980, concerned a magazine article in which a mayor was accused of rape.[96] Judge Friendly held that the article was not protected as a statement of opinion.[97] The court relied on *Greenbelt* and *Letter Carriers*, which held that accusations of misconduct were not actionable because the words did not indicate to the ordinary reader that the publication was

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insinuations of illegal conduct are actionable); Henry v. Halliburton, 690 S.W.2d 775 (Mo. 1985) (en banc); Kotlikoff v. The Community News, 89 N.J. 62, 444 A.2d 1086 (1982) (specific imputation of criminal act based on undisclosed facts is actionable); Marchiondo v. New Mexico State Tribune Co., 98 N.M. 282, 648 P.2d 321 (1982); DiBernardo v. Tonawanda Publishing, 117 A.D.2d 1009, 499 N.Y.S.2d 553 (1986) (public figure accused of "corruption" and "bribery"); Marks v. New York News, Inc., 4 Media L. Rep. (BNA) 2280 (N.Y. App. Div. 1979) (judge accused of corruption); Gewurz v. Bernstein, 107 Misc. 2d 857, 436 N.Y.S.2d 142 (1981) (attorney accused of champerty); Renwick v. News & Observer Publishing Co., 63 N.C. App. 200, 304 S.E.2d 593 (1983), *rev'd*, 310 N.C. 312, 312 S.E.2d 405, *reh'g denied*, 310 N.C. 749, 315 S.E.2d 704, *cert. denied*, 469 U.S. 858 (1984); First State Bank of Corpus Christi v. Ake, 606 S.W.2d 696 (Tex. Civ. App. 1980) (bank chairman accused of dishonesty in a fidelity bond claim); Vern Sims Ford, Inc. v. Hagel, 42 Wash. App. 675, 713 P.2d 736, *review denied*, 105 Wash. 2d 1016 (1986).

89. 42 N.Y.2d 369, 366 N.E.2d 1299, 397 N.Y.S.2d 943, *cert. denied*, 434 U.S. 969 (1977).

90. *Id.* at 376–77, 366 N.E.2d at 1303, 397 N.Y.S.2d at 948.

91. *Id.* at 381–82, 366 N.E.2d at 1306–07, 397 N.Y.S.2d at 950–51.

92. *Id.*

93. *Id.* at 382, 366 N.E.2d at 1307, 397 N.Y.S.2d at 951 (citations omitted).

94. *See, e.g., In re* Yagman, 796 F.2d 1165 (9th Cir. 1986); Lauderback v. American Broadcasting Cos., 741 F.2d 193 (8th Cir. 1984), *cert. denied*, 469 U.S. 1190 (1985); Mr. Chow of New York v. Ste. Jour Azur S.A., 759 F.2d 219 (2d Cir. 1985); Lewis v. Time, Inc., 710 F.2d 549 (9th Cir. 1983); Street v. National Broadcasting Co., 645 F.2d 1227 (6th Cir.),*cert. granted*, 454 U.S. 815, *cert. dismissed*, 454 U.S. 1095 (1981); Murray v. Bailey, 613 F. Supp. 1276 (N.D. Cal. 1985); Ricci v. Venture Magazine, Inc., 574 F. Supp. 1563 (D. Mass. 1983); Cantrell v. American Broadcasting Cos., 529 F. Supp. 746 (N.D. Ill. 1981) (applying Illinois law); McManus v. Doubleday & Co., 513 F. Supp. 1383 (S.D.N.Y. 1981) ("homicidal tendencies" attributed to priest).

95. 639 F.2d 54 (2d Cir. 1980).

96. *Id.* at 55–57.

97. *Id.* at 61.

accusing the plaintiff of having committed a crime.[98] Conversely, Judge Friendly concluded that an assertion of criminal activity would be actionable if the reasonable reader would infer that the plaintiff was being accused of a crime.[99]

The *Cianci* court provided the following guidelines to the criminal conduct distinction: 1) generally, a pejorative statement of opinion concerning a public figure is constitutionally safeguarded no matter how vituperous or unreasonable it may be; 2) unqualified constitutional protection is afforded to statements that may refer to criminal activity when an ordinary person would find the meaning ambiguous in context; and 3) an allegation of misconduct that could reasonably be understood as imputing specific criminal conduct is actionable defamation.[100] A charge of illegal conduct is not protected as pure opinion because criminal accusations are inherently laden with factual connotations. Therefore, an accusation cast in the form of an opinion will not protect the defendant from liability.[101] The court reasoned that:

> Were such an objection to be sustained to an action for slanderous words, it would be easy for one who designed to injure the character of another to effect his malicious purpose without incurring any responsibility. By circulating the slander clothed in expressions of opinion or belief, he might destroy the fairest reputation with impunity. But the law will not permit an injury done to character to be without remedy by such artifice as this.[102]

III. The Fact-Opinion Doctrine in Ohio

A. *The Common-Law Approach*

At common law Ohio courts gave qualified protection[103] to comments concerning matters of public interest made by a writer with an honest belief in their truth.[104] In the majority of jurisdictions, including Ohio, this fair comment privilege required the statement to be based on true facts, to be free from imputations of corrupt or dishonorable motives except as warranted by the facts, and to be an honest expression of the writer's genuine opinion.[105] Hence, this defense did not apply to statements of

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98. *Id.* at 65.

99. *Id.* Note that the allegation in *Cianci*, like many other cases involving charges of criminal conduct, was based on misstatements of fact. *Id.* at 66. To the extent that these accusations are based on false statements of fact or undisclosed defamatory facts supporting the charge, analysis under the *Restatement* indicates the comment is unprotected opinion. Restatement (Second) of Torts § 566 (1977). *See also* Note, *The Fact-Opinion Dilemma*, *supra* note 52.

100. Cianci v. New Times Publishing Co., 639 F.2d 54, 64 (2d Cir. 1980).

101. *Id.* at 66 (accusation of crime qualified by "I think" not likely to be considered opinion); Eldredge, *supra* note 3, at 105–06.

102. Logan v. Steele, 4 Ky. (1 Bibb) 593 (1809), *quoted in* Eldredge, *supra* note 3, at 106.

103. Publications having a qualified privilege arise out of the circumstances of the publication, and depend upon publishing in good faith and exercising reasonable diligence to ascertain the truth of the statements. The privilege is qualified because "the plaintiff may recover, if actual malice be shown, notwithstanding the existence of the circumstances which would otherwise make the publication a privileged one." Post Publishing Co. v. Moloney, 50 Ohio St. 71, 84, 33 N.E. 921, 924 (1893). *See also supra* note 33.

104. *See* Cleveland Leader Printing Co. v. Nethersole, 84 Ohio St. 118, 95 N.E. 735 (1911); Post Publishing Co. v. Moloney, 50 Ohio St. 71, 33 N.E. 921 (1893); Driscoll v. Block, 3 Ohio App. 2d 351, 210 N.E.2d 899 (1965); McCarthy v. Cincinnati Enquirer, Inc., 101 Ohio App. 297, 136 N.E.2d 393 (1956); Shallenberger v. Scripps Publishing Co., 8 Ohio N.P. (n.s.) 633, *aff'd*, 42 Ohio C.C. 283 (1909), *aff'd*, 85 Ohio St. 492, 98 N.E. 1132 (1912).

Although the need for the traditional fair comment defense has become obsolete with respect to public figures and public officials because of the *Sullivan* actual malice test (*see supra* note 27), the doctrine persists in Ohio. *See, e.g.*, Greer v. Columbus Monthly Publishing Corp., 4 Ohio App. 3d 235, 240, 448 N.E.2d 157, 163 (1982).

105. *See generally id.*; *supra* note 17.

fact, and therefore required the courts to distinguish between statements of fact and opinion.[106] Although this distinction occasionally turned on a subjective judicial judgment,[107] several guidelines emerged in Ohio.[108] A proper inquiry focused on the ordinary reader's reasonable interpretation of a defamatory statement, given the common usage or meaning of the defamatory words, the verifiability of the comment, the context of the statement, and an examination of the circumstances surrounding the entire publication.[109]

The fact-opinion distinction was not applied to material that was slanderous per se. Thus, imputations of indictable criminal offenses were considered actionable because the manifestly hurtful statements were facts capable of being proved false.[110] Ohio courts, however, did not specifically address the constitutional mandate to separate fact from opinion until *Milkovich v. News-Herald.*[111]

B. *Criminal Conduct Allegations: The* Milkovich *Precedent*

In late 1984 the Ohio Supreme Court first addressed the issue of whether an allegedly defamatory article was an expression of fact or opinion.[112] *Milkovich v. News-Herald*[113] concerned a sports column that accused a high school wrestling

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106. *See* Westropp v. E.W. Scripps Co., 148 Ohio St. 365, 74 N.E.2d 340 (1947). "[T]he rule that fair comment on and criticism of the acts and conduct of a public officer or candidate for public office are, in the absence of malice, privileged, does not apply to a false statement of fact." *Id.* at 376, 74 N.E.2d at 346. *See also supra* notes 17–21 and accompanying text.

107. *See, e.g.*, Foster v. Fesler, 27 Ohio Dec. 127 (1915), *aff'd*, 37 Ohio C.C. 125 (1916).

108. *See* McCarthy v. Cincinnati Enquirer, Inc., 101 Ohio App. 297, 136 N.E.2d 393 (1956). *See also* Cleveland Leader Printing Co. v. Nethersole, 84 Ohio St. 118, 95 N.E. 735 (1911); Greer v. Columbus Monthly Publishing Corp., 4 Ohio App. 3d 235, 448 N.E.2d 157 (1982) (reviewing article as a whole).

109. Rudiments of the *Ollman* totality of circumstances test can be found in *McCarthy v. Cincinnati Enquirer*. The case concerned an editorial about the fluoridation of the public water supply. The comments were determined to be nonactionable opinion. A contextual analysis was applied to the word "misrepresenting," which was found to be subject to an innocuous connotation. In addition, the statement was not provable because the term was ambiguous. Moreover, the court specifically considered "the material set forth in the petition as libelous in connection with the entire publication, keeping in mind the theme of the same, the entire circumstance and that the occasion was one of controversy on a public question perhaps vitally affecting the public health." *Id.* at 305, 136 N.E.2d at 399. *See also supra* notes 52–63 and accompanying text.

110. *See, e.g.*, Post Publishing Co. v. Moloney, 50 Ohio St. 71, 33 N.E 921 (1893); State v. Smily, 37 Ohio St. 30 (1881); Todd v. East Liverpool Publishing Co., 9 Ohio C.C. (n.s.) 249, *rev'd*, 29 Ohio C.C. 155 (1906), *aff'd*, 81 Ohio St. 521, 91 N.E. 1128 (1909); Kahn v. Cincinnati Times-Star, 8 Ohio N.P. 616 (1890), *aff'd*, 52 Ohio St. 662, 44 N.E. 1132 (1895); McGuire v. Roth, 8 Ohio Misc. 92, 219 N.E.2d 319 (1965); Cincinnati Gazette Co. v. Bishop, 6 Ohio Dec. Reprint 1113 (1882) (groundless charges of conspiracy actionable because charges were facts rather than legitimate criticism); Wahle v. Cincinnati Gazette Co., 6 Ohio Dec. Reprint 709 (1879) (fair comment defense inapplicable to charges of larceny). *See also supra* note 84.

111. 15 Ohio St. 3d 292, 473 N.E.2d 1191 (1984).

112. Milkovich v. News-Herald, 15 Ohio St. 3d 292, 298, 473 N.E.2d 1191, 1196 (1984) ("[T]his court has not adopted any specific standard with which to guide courts in determining what constitutes an expression of opinion, and what constitutes an expression of fact.").

113. Milkovich filed a defamation action in the Court of Common Pleas of Lake County against the *News-Herald*, its parent company, and the journalist. The trial court directed a verdict in favor of the defendants on the grounds that Milkovich failed to establish actual malice. The court of appeals reversed and remanded, holding that a reasonable jury could have found that the defendants published the article with actual malice. The Ohio Supreme Court denied the defendant's motion to certify the record and the United States Supreme Court denied certiorari. On remand, the trial court granted the defendant's motion for summary judgment because the allegedly defamatory statements were opinion. The appellate court affirmed, holding that Milkovich was a public figure, that the statements were constitutionally protected opinion, and that the article was published with actual malice. The Ohio Supreme Court reversed the lower courts. *Id.* at 292–94, 473 N.E.2d at 1191–93.

coach, Michael Milkovich, of committing perjury.[114] First, the court held that Milkovich was not a public figure or public official as a matter of law.[115] Next, the court examined the fact-opinion distinction.[116] After addressing several of the tests used to distinguish between fact and opinion, the court declined to establish a per se rule in determining what constitutes a protected opinion or a potentially actionable statement of fact.[117] The court's somewhat cursory analysis considered the following: 1) whether there were adequate precautions alerting the reader that the column was an assertion of opinion; and 2) whether the plain import of the author's assertions was that Milkovich committed the crime of perjury.[118] The court concluded that the statements at issue were factual assertions as a matter of law and were not constitutionally protected as opinions of the writer.[119]

The Ohio Supreme Court adopted the guidelines advocated by Judge Friendly in *Cianci* to analyze accusations of criminal conduct: If the statement can reasonably be understood in context to refer to criminal conduct, and if the statement could reasonably be interpreted to infer specific criminal acts to the plaintiff, the comment is inherently factual and is redressable.[120] Therefore, the *Milkovich* court afforded the allegations of criminal conduct only qualified constitutional protection because these statements are replete with factual connotations.[121] Furthermore, Ohio's highest court quoted Judge Friendly: "It would be destructive of the law of libel if a writer could escape liability for accusations of crime simply by using, explicitly or implicitly, the words 'I think.'"[122] Thus, the Ohio Supreme Court adopted the common-law approach advocated by Judge Friendly, which refuses to protect accusations of criminal conduct cloaked with qualifying language.[123]

IV. *Scott v. News-Herald*

A. *Facts and Holding*

In *Scott v. News-Herald*,[124] the Ohio Supreme Court abandoned the rationale used to distinguish fact and opinion in *Milkovich*.[125] Although *Scott* concerned the same *News-Herald* article that was considered in *Milkovich*, the court effectively overruled the fact-opinion portion of the case only twenty months after it was decided.[126] Both suits involved a column written by sportswriter J. Theodore

114. See *infra* notes 124–37 and accompanying text for a more detailed explanation of the facts surrounding the *Milkovich* decision. Both the *Mikovich* and *Scott* cases arose from the accusations printed in the same *News-Herald* article.

115. Milkovich v. News-Herald, 15 Ohio St. 3d 292, 297, 473 N.E.2d 1191, 1196 (1984).

116. *Id.* at 298–99, 473 N.E.2d at 1196–97.

117. *Id.* at 298, 473 N.E.2d at 1196.

118. *Id.* at 299, 473 N.E.2d at 1197.

119. *Id.* at 298–99, 473 N.E.2d at 1196–97.

120. *See* Cianci v. New Times Publishing Co., 639 F.2d 54, 64 (2d Cir. 1980).

121. Milkovich v. News-Herald, 15 Ohio St. 3d 292, 299, 473 N.E.2d 1191, 1197 (1984).

122. *Id.* (quoting Cianci v. New Times Publishing Co., 639 F.2d 54, 64 (2d Cir. 1980)).

123. *See supra* notes 95–101 and accompanying text.

124. 25 Ohio St. 3d 243, 496 N.E.2d 699 (1986).

125. *See supra* notes 112–23 and accompanying text.

126. Justices Andy Douglas and Robert G. Holmes replaced Justices William B. Brown and James P. Celebrezze in the 1984 election.

Diadiun that was published in the sports section of the *News-Herald* in Willoughby, Ohio.[127] The article recounted the circumstances surrounding an interscholastic wrestling match and the subsequent events related to the incident.

In February 1974 Maple Heights High School hosted a wrestling meet against Mentor High School. When a Maple Heights wrestler was disqualified by the referee, a fight broke out involving spectators and members of both teams. H. Donald Scott, then the Superintendent of Maple Heights Public Schools, witnessed the altercation.[128] Scott and the former head wrestling coach of Maple Heights, Michael Milkovich, were called to testify before the Ohio High School Athletic Association (OHSAA). The association placed the entire Maple Heights team on probation, thus precluding participation in the state tournament, and censured Milkovich for his actions during the match.[129]

Thereafter, wrestlers and parents filed suit against the OHSAA in the Court of Common Pleas of Franklin County. They contended that the association's hearing violated due process in imposing sanctions. Both Scott and Milkovich testified at the proceeding.[130] The trial court ruled that the OHSAA had violated due process, and it reversed the probation and ineligibility orders.[131] The following day Diadiun's column appeared on the front page of the *News-Herald*'s sports section.[132] The journalist stated that he had attended the wrestling match and the administrative hearing, and he purportedly discussed the court trial with the Commissioner of the OHSAA.[133] The article's headline read, "Maple beat the law with the 'big lie,'" and the words "TD Says" were beneath the title. The carryover page was entitled ". . . Diadiun says Maple told a lie."[134] The report went on to accuse both men of misrepresenting the events that led to the OHSAA sanctions in an attempt to shift the blame to the opposing team.[135] The article stated near the end: "Anyone who attended the meet, whether he be from Maple Heights, Mentor, or [an] impartial observer, knows in his heart that Milkovich and Scott lied at the [due process] hearing after each having given his solemn oath to tell the truth."[136]

Both Scott and Milkovich filed separate libel suits, naming the *News-Herald* and its parent company, the Lorain County Company, as the defendants.[137] The *Scott* trial court dismissed the action on summary judgment. The court held that Scott was a public official for libel purposes, that the article was constitutionally protected opinion, and that the plaintiff failed to prove the *Sullivan* actual malice standard.[138]

127. Milkovich v. News-Herald, 15 Ohio St. 3d 292, 292, 473 N.E.2d 1191, 1191 (1984).
128. Scott v. News-Herald, 25 Ohio St. 3d 243, 243, 496 N.E.2d 699, 700 (1986).
129. *Id.*
130. *Id.*
131. *Id. See* Barrett v. Ohio High School Athletic Ass'n, No. 74 Civ. 09-3390 (Franklin Cty. Jan. 7, 1975).
132. Scott v. News-Herald, 25 Ohio St. 3d 243, 277–78, 496 N.E.2d 699, 727–28 (1986).
133. *Id.* at 244, 496 N.E.2d at 701.
134. *Id.* at 243, 277–78, 496 N.E.2d at 701, 727–28.
135. *Id.* at 243–44, 496 N.E.2d at 701.
136. *Id.* at 244, 278, 496 N.E.2d at 701, 728.
137. *Id.* at 244, 496 N.E.2d at 701.
138. *Id.*

The Court of Appeals for Lake County affirmed the lower court.[139] Although the *News-Herald* prevailed in both defamation cases at trial, different results were reached by the Ohio Supreme Court. In *Milkovich*, the state's highest court held that the article in question was too factually laden to be considered opinion.[140] On the other hand, the same court in *Scott* reversed itself, ruling that the statements were opinion deserving of unqualified first amendment protection.[141]

B. *The* Scott *Opinions*

In *Scott*, Justice Locher, writing for a divided court, explicitly overruled *Milkovich* with respect to the application of the fact-opinion doctrine.[142] The court unanimously held that Scott was a public official for purposes of defamation law.[143] Furthermore, all of the justices agreed that actual malice was not established.[144] Clear and convincing evidence was not produced which would prove that the defendants made a false statement with a high degree of awareness of probable falsity.[145] Finally, the court adopted the four-factor totality of circumstances test outlined by Judge Starr in *Ollman v. Evans* to distinguish fact and opinion.[146] The Ohio Supreme Court majority noted that stare decisis did not bind it to the *Milkovich* precedent because no test, no analysis, and no rules were articulated to support the majority opinion.[147] Hence, the court claimed that it was justified in the present determination that Diadiun's article was constitutionally protected opinion.[148]

Scott v. News-Herald engendered seven different opinions. Justices Holmes, Douglas, and Wright concurred with Justice Locher's opinion. Justice Holmes merely noted that stare decisis was not violated, stating that a decision which is "clearly wrong" should be overruled because there is "no valid public purpose to allow incorrect opinions to remain in the body of our law."[149] Justice Douglas agreed that the statements in question were clearly opinion.[150] Justice Wright agreed with the adoption of the totality of circumstances test, but he went on to advocate a "bright-line" rule to eliminate the uncertainty of characterizing statements as fact or opinion.[151] This approach would afford complete constitutional protection to articles

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139. *Id. See* Scott v. News-Herald, No. 9-128, slip. op. (Lake Cty. Dec. 30, 1983) (LEXIS, States library, Ohio file), *aff'd*, 25 Ohio St. 3d 243, 496 N.E.2d 699 (1986).

140. Milkovich v. News-Herald, 15 Ohio St. 3d 292, 299, 473 N.E.2d 1191, 1196–97 (1984).

141. Scott v. News-Herald, 25 Ohio St. 3d 243, 244, 254, 496 N.E.2d 699, 701, 709 (1986).

142. *Id.* at 244, 496 N.E.2d at 701.

143. *Id.* at 248, 496 N.E.2d at 704.

144. *Id.* at 249, 496 N.E.2d at 705. *See also id.* at 263, 496 N.E.2d at 716 (Celebrezze, C.J., concurring in judgment only); *id.* at 266, 496 N.E.2d at 718 (Sweeney, J., concurring in judgment only); *id.* at 270, 496 N.E.2d at 721 (Brown, J., concurring in part).

145. *Id.*

146. *Id.* at 250, 496 N.E.2d at 706 (citing Ollman v. Evans, 750 F.2d 970, 979 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985); Janklow v. Newsweek, Inc., 759 F.2d 644, 649 (8th Cir. 1985), *cert. denied*, 107 S. Ct. 272 (1986)).

147. *Id.* at 249, 496 N.E.2d at 705.

148. *Id.*

149. *Id.* at 254, 496 N.E.2d at 709 (Holmes, J., concurring).

150. *Id.* at 255, 496 N.E.2d at 709 (Douglas, J., concurring).

151. *Id.* at 262, 496 N.E.2d at 715 (Wright, J., concurring).

specifically labeled "opinion"; statements made without the opinion label, not located in the editorial section, would be given only limited protection.[152]

Chief Justice Celebrezze and Justice Sweeney concurred in the judgment only. Both men agreed with the majority's conclusion that Scott was a public official and that he failed to establish actual malice.[153] However, neither justice agreed that *Milkovich* should have been overruled on the fact-opinion issue, and they criticized the majority for adopting the totality of circumstances test.[154] Chief Justice Celebrezze characterized the test as an "amorphous" and "unworkable" analysis that is "used to complete the Jekyll and Hyde transformation of this newspaper article from fact to opinion."[155] He noted that criminal accusations, even if expressed as opinion, are not afforded absolute first amendment protection.[156] Similarly, Justice Sweeney noted that the test "can be juxtaposed to forge any interpretation that the user of the 'test' desires."[157] He advocated using the *Cianci* court rationale, which gives special consideration to allegations of criminal conduct similar to the common-law doctrine of slander per se.[158]

Justice Clifford F. Brown agreed with the public figure and actual malice determinations.[159] However, in a scathing opinion, he claimed that "any reader of today's majority opinion can readily see the real rule adopted by the majority: in a libel case, *the newspaper always wins.*"[160] He characterized the majority's "concerns and/or tests" as "no more than a geyser spouting judicial steam, fog, and mist."[161] Justice Brown claimed that *Milkovich* set forth a workable test to distinguish fact from opinion.[162] Because Diadiun's article ascribed criminal conduct to Scott, it warranted analysis under the *Cianci* rationale that was outlined in *Milkovich*.[163] The *Ollman* test was inapplicable. However, he maintained that Diadiun's article would constitute a statement of fact even when the "vapid, meaningless, so-called four-factor test" was properly employed.[164] Justice Brown also charged that the majority rushed "hell-bent" to overrule *Milkovich* "[i]n order to curry favor with the media at large in an election year."[165] In conclusion, he castigated "the verbal orgy of nonsensical jargon which cascades from the majority's discussion of the spurious four-factor test" because it would make "every statement of fact a statement of opinion in every case and therefore not actionable."[166]

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152. *Id.* at 261–63, 496 N.E.2d at 714–16 (Wright, J., concurring). *See also* Note, *The Fact-Opinion Distinction*, *supra* note 47.

153. Scott v. News-Herald, 25 Ohio St. 3d 243, 263, 266, 496 N.E.2d 699, 716, 718 (1986) (Celebrezze, C.J., and Sweeney, J., concurring in judgment only, dissenting in part).

154. *Id.*

155. *Id.* at 263, 496 N.E.2d at 716 (Celebrezze, C.J., dissenting in part).

156. *Id.* at 265, 496 N.E.2d at 717 (Celebrezze, C.J., dissenting in part).

157. *Id.* at 267, 496 N.E.2d at 719 (Sweeney, J., dissenting in part).

158. *Id.*

159. *Id.* at 269–70, 496 N.E.2d at 721 (Brown, J., concurring in part, dissenting in part).

160. *Id.* at 271 n.10, 496 N.E.2d at 721 n.10 (Brown, J., dissenting in part) (emphasis in original).

161. *Id.* at 273, 496 N.E.2d at 723 (Brown, J., dissenting in part).

162. *Id.* at 270, 496 N.E.2d at 721 (Brown, J., dissenting in part).

163. *Id. See also supra* notes 112–23 and accompanying text.

164. *Id.* at 275, 496 N.E.2d at 725 (Brown, J., dissenting in part).

165. *Id.*

166. *Id.* at 276, 496 N.E.2d at 725 (Brown, J., dissenting in part).

V. Proper Analysis of the Fact-Opinion Dichotomy in *Scott*

A. *The Totality of Circumstances Test*

1. *The Precision Prong*

Justice Locher began the fact-opinion analysis in *Scott v. News-Herald* by recognizing the various standards used to separate fact from opinion.[167] The majority chose to adopt the totality of circumstances test that was outlined by Judge Starr of the D.C. Circuit in *Ollman v. Evans*.[168] First, the Ohio Supreme Court examined the common usage or meaning behind the specific language of the allegedly defamatory statement.[169] A statement that is indefinite and ambiguous is not actionable; however, if a reasonable reader would understand the statement as having a precise meaning, it would only deserve qualified constitutional protection.[170] Although the word "perjury" was not used, Justice Locher correctly concluded that the plain import of Diadiun's article was that Scott lied in court after he had sworn to tell the truth.[171] Thus, the consensus of understanding would be that the article charged Scott with an indictable crime. The court concluded that Scott would have a valid cause of action if no further inquiry were made.[172]

When Judge Starr explained the considerations behind the first prong of the totality of circumstances test, he gave two examples of statements at opposite ends of the fact-opinion dichotomy.[173] At the opinion end of the spectrum was the term "fascist." He characterized the term as opinion because it does not have a precise definition or a distinct meaning, and it is often used in heated political debate.[174] At the factual end of the spectrum was an accusation of criminal conduct. Judge Starr concluded that a reasonable reader would interpret imputations of illegal activity to imply severely damaging facts.[175]

Courts have agreed that accusing a person of lying while under oath constitutes a factual assertion[176] partly because an imputation of perjury has a precise definition.[177] Since this accusation of criminal conduct has a distinct meaning, the ordinary reader of the *News-Herald* column would assume that the journalist,

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167. *Id.* at 250, 496 N.E.2d at 705–06.

168. 750 F.2d 970 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985).

169. Scott v. News-Herald, 25 Ohio St. 3d 243, 250–51, 496 N.E.2d 699, 706–07 (1986).

170. *See* Janklow v. Newsweek, Inc., 788 F.2d 1300, 1302, 1303–04 (8th Cir.), *cert. denied*, 107 S. Ct. 272 (1986); Ollman v. Evans, 750 F.2d 970, 979–81 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985).

171. Scott v. News-Herald, 25 Ohio St. 3d 243, 251, 496 N.E.2d 699, 707 (1986).

172. *Id.*

173. Ollman v. Evans, 750 F.2d 970, 979–81 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985).

174. *Id.* at 980–81 (citing Buckley v. Littell, 539 F.2d 882, 895 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977)).

175. *Id.* at 980 (citing Cianci v. New Times Publishing Co., 639 F.2d 54, 63 (2d Cir. 1980) and Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369, 366 N.E.2d 369, 397 N.Y.S.2d 943, *cert. denied*, 434 U.S. 969 (1977)).

176. *See, e.g.*, Di Lorenzo v. New York News, 81 A.D.2d 844, 432 N.Y.S.2d 483 (1981). *See also supra* note 86.

177. Perjury by a witness is a crime under 18 U.S.C. § 1621 (1982). *See also* Scott v. News-Herald, 25 Ohio St. 3d 243, 251, 496 N.E.2d 699, 707 (1986) (holding an accusation of lying under oath implied perjury, a precisely defined criminal offense); Black's Law Dictionary 1025 (5th ed. 1979) (defining the term "perjury" as "a crime committed when a lawful oath is administered, in some judicial proceeding, to a person who swears, wilfully, absolutely, and falsely, in a matter material to the issue or point in question.").

Theodore Diadiun, based his statements on unstated facts which indicated that Scott lied under oath. However, the journalist failed to disclose any lie that Scott told while he was under oath. If the average reader would infer that the writer had an undisclosed factual basis for the statement, the reader "does not have the tools necessary to independently evaluate the opinion and may rely on unfounded opinion that defames an individual."[178]

2. *The Verifiability Prong*

The second part of the totality of circumstances test also supports the conclusion that the *News-Herald* article was factual.[179] This guideline concerns whether the statement is objectively verifiable. A reasonable reader will believe that a statement is opinion if it has no plausible method of verification.[180] The *Scott* court held that the allegation of perjury could be proven or disproven with evidence adduced from transcripts and witnesses present at the hearing.[181] In contrast to a subjective comment that cannot be characterized as true or false, the allegedly defamatory remarks were an articulation of an objectively verifiable action. Hence, Justice Locher logically concluded that both the first and second factors of the *Ollman* test indicated that the accusations made in Diadiun's column were factual.[182]

3. *The Context Prong*

Under the third prong of the totality of circumstances test, a court should consider the complete literary context of the statement to determine whether the language surrounding the statement would cause the average reader to infer that the specific language used was opinion.[183] First, Justice Locher noted that the article's byline and the caption "TD Says" indicated to the average reader that the column was opinion.[184] Although these words attribute the contents of the column to Diadiun, the presence of the writer's name does not effectively caution a reasonable reader that only statements of opinion follow.[185] Certainly, the journalist reported some facts in his article. Nevertheless, Justice Locher asserted that the caption attributing the article to Diadiun "would indicate to even the most gullible reader that the article was, in fact, opinion."[186] This notion is contradicted by two members of the Ohio

178. Lauderback v. American Broadcasting Cos., 741 F.2d 193, 195–96 (8th Cir. 1984), *cert. denied*, 469 U.S. 1190 (1985) (no undisclosed facts existed necessary for viewer to make an independent evaluation), *cited in* Scott v. News Herald, 25 Ohio St. 3d 243, 250, 496 N.E.2d 699, 706 (1986). *See also* Kelly v. Schmidberger, 806 F.2d 44 (2d Cir. 1986) (since charge made against plaintiffs was not accompanied by an explanation, no signal was given to reader that statement was opinion). Thus, under the *Restatement* analysis, Diadiun's article would be considered fact because the allegation of perjury was based on undisclosed defamatory facts. *See supra* note 51.

179. Scott v. News-Herald, 25 Ohio St. 3d 243, 251–52, 496 N.E.2d 699, 707 (1986).

180. *See* Janklow v. Newsweek, Inc., 788 F.2d 1300, 1302, 1304 (8th Cir.), *cert. denied*, 107 S. Ct. 272 (1986); Ollman v. Evans, 750 F.2d 970, 981–82 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985).

181. Scott v. News-Herald, 25 Ohio St. 3d 243, 252, 496 N.E.2d 699, 707 (1986).

182. *Id.* at 250–52, 496 N.E.2d at 706–07 (holding that the statement was both clearly defined and verifiable).

183. *See* Janklow v. Newsweek, Inc., 788 F.2d 1300, 1302–03, 1304 (8th Cir.), *cert. denied*, 107 S. Ct. 272 (1986); Ollman v. Evans, 750 F.2d 970, 982–83 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985).

184. Scott v. News-Herald, 25 Ohio St. 3d 243, 252, 496 N.E.2d 699, 707 (1986).

185. *Id.* at 264, 272–73, 496 N.E.2d at 716, 723 (Celebrezze, C.J., and Brown, J., dissenting in part).

186. *Id.* at 252, 496 N.E.2d at 707.

Supreme Court who found that the existence of the writer's name "merely identifies the author of the factual assertion which follows."[187] Moreover, the *Milkovich* court noted that nothing in the same article cautioned the recipients that the statements were opinion.[188] The divergent viewpoints expressed by the court evidence that a reasonable reader could easily interpret the column to contain factual assertions.

Next, Justice Locher examined the cautionary language surrounding the allegedly libelous statements.[189] He noted that the article did not use any qualifying phrases such as "I think" or "in my opinion," which might put the average reader on notice that the article was opinion.[190] Furthermore, the court recognized Judge Friendly's observation that a writer should not be able to escape liability in a defamation suit simply by prefacing a libelous statement with the words "I think."[191] The majority reasoned, however, that the article's major premise concerned the need for people in positions of authority to be completely honest when their actions are called into question; therefore, this concept was the subjective basis for writing the article. Because the report that Milkovich and Scott lied under oath was not the major issue when read in context, Justice Locher concluded that the accusation was more inclined to be construed as opinion.[192]

Although the allegedly defamatory statement may not have been the major premise of the column, a newspaper cannot escape liability for the simple reason that a libelous statement was made to support the article's major thesis. The totality of circumstances test has never mandated this analysis. The subjective conclusions of an article should not transform otherwise factual assertions into opinion. It would be unreasonable to insulate a writer for reporting defamatory statements of fact so long as they merely support a conclusion. Diadiun questioned the lesson that young people might learn from high school administrators and coaches who lied under oath.[193] This conclusion, however, was based on the events surrounding the wrestling match and the accusation of perjury.[194] Thus, the writer was delivering factual reports to his

187. *Id.* at 264, 272–73, 496 N.E.2d at 716, 723 (Brown, J., dissenting in part). Similarly, Chief Justice Celebrezze also believed that the author's name served only to identify the journalist: "[T]he purpose of a caption is to identify the writer." *Id.* at 264, 496 N.E.2d at 716 (Celebrezze, C.J., dissenting in part).

188. Milkovich v. News-Herald, 15 Ohio St. 3d 292, 299, 473 N.E.2d 1191, 1197 (1984).

189. Scott v. News-Herald, 25 Ohio St. 3d 243, 252, 496 N.E.2d 699, 707 (1986).

190. *Id.*

191. *Id. Accord* Converters Equip. Corp. v. Condes Corp., 80 Wis. 2d 257, 258 N.W.2d 712 (1977). *But see* Alfego v. Columbia Broadcasting Sys., 7 Media L. Rep. (BNA) 1075 (D. Mass. 1981); Loeb v. New Times Communications Corp., 497 F. Supp. 85 (S.D.N.Y. 1980).

192. Scott v. News-Herald, 25 Ohio St. 3d 243, 252–53, 496 N.E.2d 699, 707–08 (1986).

193. *Id.* at 277–78, 496 N.E.2d at 727–28.

194. Another statement of fact was a purported quote attributed to a witness to the legal proceedings, which was used by Diadiun to support his allegation of perjury. Dr. Harold Meyer, a commissioner of the Ohio High School Athletic Association, was quoted as saying, "I can say that some of the stories told to the judge sounded pretty darned unfamiliar. . . . It certainly sounded different from what they told us." *Id.* at 253, 496 N.E.2d at 708. Justice Locher recognized two problems with this "troubling addition to the article." *Id.* at 252–53, 496 N.E.2d at 708. First, evidence indicated that the statement was never made. Second, the nature of the due process hearing made it highly unlikely that Scott even had the opportunity to lie about questions relating to specific prior actions. *Id.* at 253, 496 N.E.2d at 708. Therefore, the charge was not only based on unrevealed facts (the perjured remarks made in court), but also it was based on a disclosed fact that was presumably false. The court impliedly recognized that this statement only lent credence to the conclusion that the defamatory statement was fact. *See id.* See also RESTATEMENT (SECOND) OF TORTS § 571 (1977), which provides that, "[o]ne who publishes a slander that imputes to another conduct constituting a criminal offense is subject to liability to the other without proof of special harm . . . ." The publication of the quote that alleged criminal

reader that supported the major premise rather than preparing the reader for an opinion.[195]

The court concluded its literary analysis by contending that a contextual reading would reveal the biased nature of the article.[196] Hence, an ordinary reader would construe the imputation of perjury as opinion because the column was not impartial. Justice Locher's conclusion centers around the statement that, "Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, *knows in his heart* that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth."[197] Apparently, the majority believed that the phrase, "knows in his heart," indicated that the question of perjury was actually a subjective determination.

Although the phrase may be an attempt at colorful writing,[198] the court's reasoning ignores Diadiun's efforts to qualify his biased viewpoint. The reporter attempted to make his accusation of criminal conduct more objective, noting that an "impartial observer" would support his conclusion that Scott committed perjury.[199] Moreover, a witness' purported quotation based upon his observations buttressed the column's credibility through this presentation of objective fact.[200] In addition, Diadiun stated that he had attended both the wrestling match and the administrative hearing,[201] so he was in a logical position to determine whether Scott lied under oath. Hence, the article cannot be characterized as so replete with bias that an ordinary reader would understand the accusation to be an opinion not meant to be interpreted as a factual representation.

Even if the third prong of the totality of circumstances test indicated that the perjury allegation had characteristics of an opinion, the literary analysis should not be given conclusive weight. The Ohio Supreme Court concluded that the first and second guidelines indicated that the allegedly libelous statement was clearly defined and verifiable.[202] The *Scott* court concluded, however, that the literary context favored a determination of opinion.[203] But when a statement is as factually laden as an accusation of criminal conduct, qualifying language, biased tone, and vehement

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misconduct would be defamatory in itself under this rationale. *Compare* Baker v. Los Angeles Herald Examiner, 42 Cal. 3d 254, 721 P.2d 87, 228 Cal. Rptr. 206 (1986),*cert. denied*, 107 S. Ct. 880 (1987) (quote qualified with language of apparency indicating hypothetical nature of comment not actionable) *with* Selleck v. Globe Int'l, Inc., 166 Cal. App. 3d 1123, 212 Cal. Rptr. 838 (1985) (Article did "not merely express defendant's opinion that plaintiff made statements about his son. Rather, [it] assert[s] as a fact that plaintiff made the statements.").

195. *See generally* Brown & Williamson Tobacco Corp. v. Jacobson, 827 F.2d 1119, 1130 (7th Cir. 1987).

196. Scott v. News-Herald, 25 Ohio St. 3d 243, 253, 496 N.E.2d 699, 708 (1986).

197. *Id.* (emphasis in original).

198. *See* Catalano v. Pechous, 83 Ill. 2d 146, 419 N.E.2d 350 (1980), *cert. denied*, 451 U.S. 911 (1981) (statement made at public meeting—municipal garbage contract awarded after "two hundred forty pieces of silver changed hands . . . thirty for each alderman"—constituted charge of bribery).

199. Scott v. News-Herald, 25 Ohio St. 3d 243, 278, 496 N.E.2d 699, 728 (1986).

200. *Id.* at 264–65, 496 N.E.2d at 717 (Celebrezze, C.J., dissenting in part).

201. *Id.* at 278, 496 N.E.2d at 728 ("I was among the 2,000-plus witnesses of the meet at which the trouble broke out, and I also attended the hearing before the OHSAA, so I was in the unique position of being the only non-involved party to observe both the meet itself and the Milkovich-Scott version presented to the board.").

202. *Id.* at 250–52, 496 N.E.2d at 706–07.

203. *Id.* at 252–53, 496 N.E.2d at 707–08.

and caustic phrases are "essentially unavailable to dilute the factual implications."[204] As Judge Starr explained in *Ollman*, the immediate verbal context should be "given relatively little weight on the opinion side of the scale" if an allegation of criminal conduct is clearly defined and verifiable.[205] Thus, the Ohio Supreme Court not only misapplied the literary context considerations, but also overemphasized their importance when balancing the totality of circumstances.

4. *The Setting Prong*

Finally, Justice Locher analyzed the fourth branch of the totality of circumstances test.[206] This guideline examines the broader public context or setting in which the specific language appears.[207] The majority opinion inquired into the type of article and whether its placement in the newspaper would influence the ordinary reader's interpretation of the fact-opinion distinction.[208] The court began by noting that the article appeared on the sports page under the byline "By Ted Diadiun, News-Herald Sports Writer."[209] In conclusion, Justice Locher claimed that "a reader would not expect a sports writer on the sports page to be particularly knowledgeable about procedural due process and perjury. It is our belief that 'legal conclusions' in such a context would probably be construed as the writer's opinion."[210]

The majority's analysis creates "a veritable *per se* rule . . . whereby anything defamatory that appears in the sports pages is automatically non-actionable."[211] Even statements made in the editorial page or op-ed section, however, cannot be completely protected by the first amendment all of the time. No court has ever made a per se rule insulating all statements made on the editorial page. This prophylactic rule would become a license for libel in situations in which there is an allegation of criminal conduct. Because opinions are usually based on statements of fact, Judge Starr refused to construe all editorial remarks as statements of constitutionally protected opinion.[212] This same reasoning would be even more applicable to the sports section, which is founded more on factual reporting than on issues of public debate.

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204. Pearce v. E.F. Hutton Group, Inc., 664 F. Supp. 1490, 1502 (D.D.C. 1987) (citing Ollman v. Evans, 750 F.2d 970, 983 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985)).

205. Ollman v. Evans, 750 F.2d 970, 985–86 n.31 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985) (citing Cianci v. New Times Publishing Co., 639 F.2d 54 (2d Cir. 1980) (statement falsely accusing a public official of rape and obstruction of justice found libelous)).

206. Scott v. News-Herald, 25 Ohio St. 3d 243, 253–54, 496 N.E.2d 699, 708–09 (1986).

207. *See* Janklow v. Newsweek, 788 F.2d 1300, 1303, 1304–05 (8th Cir.), *cert. denied*, 107 S. Ct. 272 (1986); Ollman v. Evans, 750 F.2d 970, 983–85 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985).

208. Scott v. News-Herald, 25 Ohio St. 3d 243, 253–54, 496 N.E.2d 699, 708–09 (1986).

209. *Id.* at 253, 496 N.E.2d at 708.

210. *Id.* at 253–54, 496 N.E.2d at 708.

211. *Id.* at 267, 496 N.E.2d at 719 (Sweeney, J., concurring in judgment only, and dissenting in part).

212. Ollman v. Evans, 750 F.2d 970, 987 n.33 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985). Judge Starr wrote:

> Of course, we do not hold that any statement on an editorial or Op-Ed page is constitutionally privileged opinion. While such a rule would have the advantage of simplicity and clarity, it could too readily become a license to libel. Even when situated on the editorial page the statement "Mr. Jones had ten drinks at his office party and sideswiped two vehicles on his way home" would obviously be construed as a factual statement.

Id. (citation omitted).

The court misapplied the totality of circumstances test again. As Judge Starr explained in *Ollman*, factual determination is favored when the person reporting the facts is generally considered likely to be in a position to report facts.[213] Diadiun covered the story from its inception. He attended the administrative hearing at which Milkovich and Scott first testified. Furthermore, a reasonable person would assume from the witness' statement that Diadiun interviewed at least one person who attended the judicial hearing.[214] In addition, the article appeared in the *News-Herald* on the day after the trial court's decision.[215] Thus, an ordinary person would consider the journalist to be in an excellent position to give a factual account of the events. Placement on the sports page should not affect the merit of the article, and it should not definitively militate in favor of treating the statement as opinion.

B. *The Public, Political Arena Considerations*

When analyzing the fact-opinion dichotomy, a number of courts give special consideration to the first amendment principles implicated by statements that are made in a political or public forum.[216] A statement that involves criticism of the motives and intentions of a public official implicates core values of the first amendment. Hence, an ordinary reader is more likely to construe a comment concerning a public person's public conduct as an opinion than as a statement of fact.[217] Public context considerations, however, cannot be given determinative weight in the totality of circumstances test because criminal accusations against public figures are particularly susceptible to factual interpretation.[218]

The public context considerations were not adequately addressed by the *Scott* court. Justice Locher merely noted that the issue was of public importance.[219] However, other courts have recently determined that specific accusations of criminal conduct are factual even in important and controversial areas of public interest such as theological debate, the tobacco industry, and politics.[220] Diadiun's article may have been part of an ongoing public debate that was replete with political considerations, but this context should only put the reader on notice that an accusation

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213. *Id.* at 985 n.31.

214. *See* Scott v. News-Herald, 25 Ohio St. 3d 243, 278, 496 N.E.2d 699, 728 (1986).

215. *Id.* at 243, 496 N.E.2d at 700–01.

216. *See, e.g.*, Janklow v. Newsweek, 788 F.2d 1300 (8th Cir.), *cert. denied*, 107 S. Ct. 272 (1986); Saenz v. Playboy Enters., 653 F. Supp. 552 (N.D. Ill. 1987); Populist Party of Iowa v. American Black Hawk Broadcasting Co., 14 Media L. Rep. (BNA) 1217 (Iowa Dist. Ct. 1987); Capan v. Daugherty, 402 N.W.2d 561 (Minn. Ct. App. 1987). *See also* Ollman v. Evans, 750 F.2d 970, 993 (D.C. Cir. 1984) (Bork, J., concurring), *cert. denied*, 471 U.S. 1127 (1985).

217. *See* Ollman v. Evans, 750 F.2d 970, 1002 (D.C. Cir. 1984) (Bork, J., concurring), *cert. denied*, 471 U.S. 1127 (1985).

218. *See* Janklow v. Newsweek, 788 F.2d 1300, 1303 (8th Cir.), *cert. denied*, 107 S. Ct. 272 (1986).

219. *See* Scott v. News-Herald, 25 Ohio St. 3d 243, 254, 496 N.E.2d 699, 708–09 (1986). Justice Locher hastily dismissed first amendment considerations of the public, political arena in one phrase: "[T]he issues involved are of importance to the community and the vehicle for dissemination of the ideas is opinion." *Id.*

220. *See* Kelly v. Schmidberger, 806 F.2d 44 (2d Cir. 1986) (accusation of illegal conduct may be construed as fact even in context of highly charged and opinion-ridden theological debate); Brown & Williamson Tobacco Corp. v. Jacobson, 827 F.2d 1119 (7th Cir. 1987) (charge construed as fact in context of tobacco industry debate); Brasher v. Carr, No. C14-86-753-CV, slip op. (Tex. Ct. App. Nov. 12, 1987) (LEXIS, States library, Texas file) (accusations of corruption in office considered factual in context of political debate).

may be used as protected rhetorical hyperbole. In other words, the political context of a statement may be one of "public debate, heated labor dispute, or other circumstances in which an 'audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole . . . .'"[221]

For example, no reasonable reader or court would understand as factual the following specific criminal allegations when read in their respective social, political contexts: 1) an abortionist activist being accused of "murder";[222] 2) a developer charged with "raping" the land or asserting a negotiating position tantamount to "blackmail";[223] or 3) a nonunion worker called a "traitor to his country."[224] When examined in the public, political arena, these situations are clearly distinguishable from cases in which the ordinary reader is given the impression that the individual has actually committed a crime. By failing to recognize the difference between rhetorical hyperbole in the public, political arena and a serious imputation of illegal activity, the *Scott* court unjustly subordinated the individual's reputational interest to the first amendment interests of the media.

C. *The Criminal Conduct Distinction*

A number of courts do not undertake an extensive analysis under the totality of circumstances test when the allegedly libelous statement could reasonably be understood as implying specific criminal acts.[225] As Judge Friendly noted in *Cianci*, "a pejorative statement of opinion concerning a public figure generally is constitutionally protected" unless the charge "could reasonably be understood as imputing specific criminal . . . acts."[226] These jurisdictions often rely on the proposition outlined in *Rinaldi v. Holt, Rinehart & Winston, Inc.* that criminal accusations, even if opinion, are not entitled to unqualified constitutional protection.[227] This distinction, which is rooted in the common-law doctrine of slander per se, recognizes the inherently factual nature of criminal conduct charges.[228]

Chief Justice Celebrezze recognized the *Scott* majority's failure to employ Judge Friendly's guidelines that were adopted by the Ohio Supreme Court in *Milkovich*.[229] Justice Locher noted that the criminal conduct distinction was not useful in determining whether the statement was fact or opinion because it was merely a "subjective judgment call."[230] Closer examination reveals, however, that the *Cianci* guidelines incorporate the rationale of the totality of circumstances test.

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221. Information Control Corp. v. Genesis One Computer Corp., 611 F.2d 781, 784 (9th Cir. 1980) (quoting Gregory v. McDonnell Douglas Corp., 17 Cal. 3d 596, 601, 131 Cal. Rptr. 641, 644, 552 P.2d 425, 428 (1976)).

222. *See* Baird v. Roussin, 6 Media L. Rep. (BNA) 1555 (D. Mass. 1980).

223. *See* Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6 (1970).

224. *See* Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264 (1974).

225. *See supra* notes 88, 94.

226. Cianci v. New Times Publishing Co., 639 F.2d 54, 64 (2d Cir. 1980).

227. Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369, 383, 366 N.E.2d 1299, 1307, 397 N.Y.S.2d 943, 951, *cert. denied*, 434 U.S. 969 (1977). *See also supra* notes 88 and 94.

228. *See supra* note 84 and accompanying text.

229. Scott v. News-Herald, 25 Ohio St. 3d 243, 265, 496 N.E.2d 699, 717 (1986) (Celebrezze, C.J., dissenting in part).

230. *Id.* at 250, 496 N.E.2d at 706.

First, the criminal conduct distinction requires that the charge be specific.[231] This requirement parallels the first prong of the *Ollman* four-factor test.[232] The second prong of the totality of circumstances test—verifiability—is not mentioned. This factor should be presumed because all specific charges of criminal conduct are verifiable in a court of law.[233] Next, the *Cianci* guidelines suggest that expressions of opinion containing charges of criminal conduct are not afforded unqualified constitutional protection.[234] This is the same proposition mandated by the third prong of the *Ollman* test: accusations of illegal activity are so factually laden that indications of opinion in the literary context—qualifying language ("I think"), the format containing the statement, colorful or caustic writing, or a biased tone—should be unavailable to protect the writer from liability.[235] Finally, the *Cianci* guidelines incorporate the broader social context of the statement, which is the fourth factor of the *Ollman* test.[236] The statement is actionable only if the ordinary reader would understand the writer to be imputing criminal activity.[237] Thus, charges understood as extravagant exaggeration made in the public, political arena are completely protected.

Clearly, the *Scott* court should not have abandoned the *Cianci* guidelines that it adopted in *Milkovich* under the exact same factual situation. Closer examination of the criminal conduct distinction in light of the totality of circumstances test is the best method to employ when analyzing allegations of criminal conduct. Giving a presumption of fact to specific charges understood as accusations of illegal behavior merely recognizes that these statements are too factually laden to be considered opinion.

VI. Allegations of Criminal Conduct: Balancing the Totality of Circumstances

Authorities unanimously agree that the distinction between fact and opinion is rarely self-evident or exact.[238] Accusations of criminal conduct are a notorious source of confusion. Judge Friendly noted that allegations of criminal behavior are nearly always opinion.[239] On the other hand, Judge Starr uses well-defined assertions of criminal activity as an example of factual statements.[240] Nevertheless, both jurists agree that allegations of criminal conduct warrant special attention in defamation actions. The confusion surrounding the fact-opinion dichotomy can be alleviated if the factors of the totality of circumstances are properly balanced. Furthermore, when

231. *See* Cianci v. New Times Publishing Co., 639 F.2d 54, 66 (2d Cir. 1980).

232. *See supra* notes 169–78 and accompanying text.

233. *See supra* notes 179–82 and accompanying text.

234. *See* Cianci v. New Times Publishing Co., 639 F.2d 54, 66 (2d Cir. 1980).

235. *See supra* notes 183–205 and accompanying text.

236. *See supra* notes 206–15 and accompanying text.

237. *See* Cianci v. New Times Publishing Co., 639 F.2d 54, 66 (2d Cir. 1980).

238. *See, e.g.*, Ollman v. Evans, 750 F.2d 970, 978 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985) ("While courts are divided in their methods of distinguishing between assertions of fact and expressions of opinion, they are universally agreed that the task is a difficult one.").

239. Cianci v. New Times Publishing Co., 639 F.2d 54, 64 (2d Cir. 1980).

240. Ollman v. Evans, 750 F.2d 970, 980 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985).

accusations of criminal conduct are given this special consideration, neither the person's reputational interest nor the media's first amendment interest will be unjustifiably subordinated.

When a public figure or public official is accused of criminal conduct, the court first must examine the statement's specificity. Charges that are "broad brush-stroked references to unethical conduct," such as participation in a "scam," a "rip-off," "cheating," or a "con game," are too ambiguous to be considered direct charges of illegal conduct.[241] Thus, many criminal conduct defamation actions will not survive scrutiny under this analysis.[242] However, unequivocal accusations of criminal conduct are obviously laden with factual content.[243] Therefore, the first prong of the totality of circumstances test should be given tremendous weight.

Extensive analysis of criminal accusations under the verifiability prong of the *Ollman* test is not useful. As the Fourth Circuit recently noted, "verifiability is ultimately relevant only insofar as it preserves the truth defense and protects statements which the ordinary reader or listener would recognize as incapable of positive proof."[244] Because all allegations of illegal behavior are capable of objective verification in a court of law, the question is moot. Nevertheless, this factor provides another indication that criminal charges are filled with factual connotations.

The literary context deserves minimal weight when balancing the totality of circumstances surrounding an accusation of illegal activity. Linguistic devices such as cautionary language, biased tone, and caustic or colorful phrases should be unavailable to diminish the factual implications. Moreover, the form of publication—report, column, commentary, editorial, letter-to-the-editor[245]—or its location in the publication are essentially ineffective at diminishing the factual content of criminal allegations.

Finally, the courts must consider the broad social, public, and political context of the charge. This consideration must be analyzed in light of the following question: Would the ordinary reader believe that the plaintiff is being accused of a crime? If the statement is obviously an extravagant exaggeration made for effect in the broad public context, the accusation is rhetorical hyperbole and should not be actionable. But if the "ordinary and average reader would likely understand the use of these

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241. *See* Lauderback v. American Broadcasting Cos., 741 F.2d 193, 197 (8th Cir. 1984), *cert. denied*, 469 U.S. 1190 (1985) (citing Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264 (1974); Greenbelt Coop. Publishing Ass'n, Inc. v. Bresler, 398 U.S. 6 (1970)).

242. Accusations should constitute specific charges of criminal offenses if the statement bears a reasonably close resemblance to the legislative definition of a crime. *See, e.g.*, Cochran v. Indianapolis Newspapers, Inc., 175 Ind. App. 548, 372 N.E.2d 1211 (1978). Offenses involving moral turpitude should be encompassed by the analysis within this Case Comment. *See, e.g.*, Berkson v. Time, Inc., 8 A.D.2d 352, 187 N.Y.S.2d 849 (1959), *aff'd*, 7 N.Y.2d 1007, 166 N.E.2d 847, 200 N.Y.S.2d 51 (1960).

243. *See* Pearce v. E.F. Hutton Group, Inc., 664 F. Supp. 1490, 1501 (D.D.C. 1987). ("To the average reader or listener, unequivocal statements . . . about deliberate wrongdoing are obviously laden with factual content.")

244. Potomac Valve & Fitting Inc. v. Crawford Fitting Co., 829 F.2d 1280, 1289 (4th Cir. 1987). The case further held that the verifiability prong of the *Ollman* test is "a minimum threshold issue. If the defendant's words cannot be decribed as either true or false, they are not actionable, even if they are cautiously phrased and published in a learned treatise." *Id.* at 1288.

245. *See* DiBernardo v. Tonawanda Publishing,117 A.D.2d 1009, 499 N.Y.S.2d 553 (1986) (anonymous letter to the editor accusing public figure of "corruption" and "bribery" capable of being defamatory fact).

words, in the context of the entire article, as meaning that [the] plaintiff committed illegal and unethical actions," the statement must be considered fact.[246]

Balancing the four prongs of the totality of circumstances test as outlined above will clarify the distinction between criminal accusations of fact and opinion. Moreover, the outcome of the test will be more predictable. Application of this presumption of fact to specific charges of criminal conduct, which can only be overcome by a common understanding of rhetorical hyperbole in the broad social and political context, will protect the public figure's reputational interest. On the other hand, freedom of the press is protected. For example, in *Scott*, the *Sullivan* actual malice test provided qualified protection to the *News-Herald*. Because Scott, a public figure, failed to prove by clear and convincing evidence that the defamatory falsehood relating to his official conduct was made with false and reckless disregard, every member of the Ohio Supreme Court agreed that the statement was safeguarded.[247] Thus, the media's first amendment interest is effectively sheltered by the *Sullivan* actual malice and falsity tests.[248]

VII. CONCLUSION

Defamation decisions searching for the elusive distinction between fact and opinion have promulgated a variety of tests that have been manipulated to reach inconsistent conclusions. These courts have had particular difficulty drawing the first amendment line between fact and opinion when the factors of the totality of circumstances test indicate that the statement has characteristics of both fact and opinion.[249] As Judge Bowman noted in *Janklow*:

> [I]t would appear that the result to be obtained through application of the *Ollman* factors is in the eye of the judge. Clearly those factors do not yield predictability, unless the prediction is that their application almost always will result in keeping defamation actions brought by public officials and public figures from reaching a jury.
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> . . .
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> What is called for . . . in cases raising the fact/opinion issue, is a thoughtful balancing of the competing interests, not the nearly total subordination of the individual's reputational interest to the media's desire for immunity from accountability to individuals harmed by defamatory material published with actual malice.[250]

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246. Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369, 382, 366 N.E.2d 1299, 1307, 397 N.Y.S.2d 943, 951, *cert. denied*, 434 U.S. 969 (1977). *See also* Potomac Valve & Fitting Inc. v. Crawford Fitting Co., 829 F.2d 1280 (4th Cir. 1987). A statement "qualifies as an 'opinion' if it is clear from *any* of the . . . *Ollman* factors, individually or in conjunction, that a reasonable reader or listener would recognize its weakly substantiated or subjective character—and discount it accordingly." *Id.* at 1288 (emphasis in original). Analysis of criminal conduct accusations must take into account, however, the inherently factual nature of these statements. Balancing the prongs of the *Ollman* test as outlined above will allow for the increased likelihood that an ordinary reader will interpret specific charges of illegal activity as statements of fact.

247. Scott v. News-Herald, 25 Ohio St. 3d 243, 248–49, 496 N.E.2d 699, 705 (1986).

248. *See supra* note 29. *See also* Note, *Structuring Defamation Law*, *supra* note 28.

249. *See* Potomac Valve & Fitting Inc. v. Crawford Fitting Co., 829 F.2d 1280, 1288 (4th Cir. 1987). ("[T]he *Ollman* test and other tests like it leave considerable doubt as to the proper outcome when all of these factors are not in agreement.")

250. Janklow v. Newsweek, Inc., 788 F.2d 1300, 1307, 1308 (8th Cir.) (Bowman, J., dissenting), *cert. denied*, 107 S. Ct. 272 (1986).

The Ohio Supreme Court has served as a significant source of defective and discordant opinions in the defamation context. In *Milkovich v. News-Herald*, the court adopted the rationale behind the *Cianci* criminal conduct distinction.[251] Less than two years later and after the addition of two new justices, the court abandoned this rationale in favor of the *Ollman* totality of circumstances test.[252] Under the new analysis, the allegedly defamatory statements made in the newspaper were transformed from fact into fully protected opinion. However, both tests involve the same considerations, and proper application of either rationale should have led to one conclusion in *Milkovich v. News-Herald* and *Scott v. News-Herald*: The allegation of perjury was an actionable fact that only deserved qualified first amendment protection.[253]

Although comments regarding the motivations and intentions of public officials should be encouraged, false imputations of criminal activity are manifestly damaging statements undeserving of unqualified first amendment protection.[254] Even though a public figure may be less vulnerable to injury from defamation and less deserving of recovery than a private person,[255] a public figure or public official has "no less interest in protecting his reputation than an individual in private life."[256] Therefore, when considering charges of illegal activity pursuant to the totality of circumstances test, a person's interests in maintaining his reputation and living unhindered in his public and private pursuits must not be hastily subordinated to the freedoms of speech and press. Thus, if an assertion of criminal conduct is both clearly defined and verifiable under the first and second factors of the totality of circumstances test, and an ordinary reader would not construe the accusation to be an extravagant exaggeration, the statement should be presumptively considered fact and should receive only qualified constitutional protection. Application of the *Ollman* totality of circumstances test in this manner will strike a proper balance between media interests and individual interests while infusing an element of predictability into cases addressing the fact-opinion dichotomy.

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251. Milkovich v. News-Herald, 15 Ohio St. 3d 292, 299, 473 N.E.2d 1191, 1197 (1984).

252. Scott v. News-Herald, 25 Ohio St. 3d 243, 250, 496 N.E.2d 699, 706 (1986). *See also supra* notes 142–66 and accompanying text.

253. *See supra* notes 167–248 and accompanying text.

254. *See generally* Janklow v. Newsweek, 788 F.2d 1300, 1309 (8th Cir.) (Bowman, J., dissenting), *cert. denied*, 107 S. Ct. 272 (1986).

255. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). Justice Brennan noted that private persons are "more vulnerable to injury" because they lack "access to the channels of effective communication . . . to counteract false statements." Moreover, private persons are "more deserving of recovery" because "they have relinquished no part of [their] interest in the protection of [their] good name[s]" by "thrust[ing] themselves to the forefront of particular public controversies in order to influence the resolution of issues involved." *Id.* at 344–45.

256. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 46 (1971). Justice Brennan, writing for the plurality, also noted that, "While the argument that public figures need less protection because they command media attention to counter criticism may be true for some very prominent people, even then it is the rare case where the denial overtakes the original charge." *Id. See also* Hustler Magazine Inc. v. Falwell, 56 U.S.L.W. 4180, 4181 (U.S. Feb. 24, 1988) (No. 86–1278); Janklow v. Newsweek, 788 F.2d 1300, 1307–08 (8th Cir.) (Bowman, J., dissenting), *cert. denied*, 107 S. Ct. 272 (1986).